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EDITOR'S NOTE

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. 84-1499-CFR Title: Local Number 93, International Association of
atus: GRANTED Firefighters, AFL-CIO C.L.C., Petitioner
v.
City of Cleveland, et al.

reted:
ne 19, 1985 Court: United States Court of Appeals
for the Sixth Circuit

e also:
84-1650 Counsel for petitioners: Summers,William Lawrence
85-1085
85-1124 Counsel for respondents: Stage Jr.,Edward R., Mascaro,John D.

try	Date	Note	Proceedings and Orders
1	Jun 19 1985	G	Petition for writ of certiorari filed.
3	Jul 15 1985		Order extending time to file response to petition until August 9, 1985.
4	Jul 18 1985		Brief of respondents City of Cleveland, et al. in opposition filed.
5	Jul 24 1985		Brief amicus curiae of United States filed.
7	Aug 9 1985		Brief of respondent Vanguards of Cleveland in opposition filed.
8	Aug 14 1985		DISTRIBUTED. September 30, 1985
9	Oct 7 1985		Petition GRANTED. The case is set for oral argument in tandem with No. 84-1656, Local 28 etc. v. Equal Employment Opportunity Commission.
10	Nov 1 1985		Record filed.
11	Nov 1 1985		Certified copy of original record & C.A. proceedings received.
12	Nov 4 1985		Record filed.
13	Nov 4 1985		Certified copy of original record including 6 volumes of pleadings and 4 volumes of transcript received.
15	Nov 13 1985		Order extending time to file brief of petitioner on the merits until December 2, 1985.
16	Nov 19 1985		Brief amicus curiae of Pacific Legal Foundation filed.
17	Nov 21 1985		Brief amicus curiae of Washington Legal Foundation filed.
18	Nov 26 1985		Brief amicus curiae of Anti-Defamation League of B'Nai B'Rith, et al. filed.
19	Dec 2 1985		Brief amicus curiae of United States filed.
20	Dec 2 1985		Brief amicus curiae of International Assn. of Fire Fighters, AFL-CIO,C.L.C. filed.
21	Dec 2 1985		Brief amicus curiae of Local 542, Internatl. Union of Oper. engineers, et al. filed. VIDEO.
22	Dec 2 1985		Joint appendix filed.
23	Dec 2 1985		Brief of petitioner Local 93, etc. filed.
25	Dec 12 1985		Order extending time to file brief of respondent on the merits until January 10, 1986.
26	Dec 17 1985	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
27	Dec 17 1985	G	Motion of respondents Vanguards of Cleveland for divided argument filed.
29	Dec 23 1985	G	Motion of respondents City of Cleveland, et al. for divided argument filed.

o. 84-1999-CFX

ntry	Date	Note	Proceedings and Orders
30	Dec 30 1985		Order further extending time to file brief of respondent on the merits until January 24, 1986.
31	Dec 30 1985		The above extension applies to all respondents.
32	Jan 3 1986		Brief amicus curiae of Natl. Conference of Black Mayors, Inc. filed. VIDED.
33	Jan 7 1986		SET FOR ARGUMENT, Tuesday, February 25, 1986. (4th case)
34	Jan 13 1986		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
35	Jan 13 1986		Motion of respondents Vanguards of Cleveland for divided argument GRANTED.
36	Jan 13 1986		Motion of respondents City of Cleveland, et al. for divided argument GRANTED.
37	Jan 24 1986		CIRCULATED.
38	Jan 24 1986	X	Brief amicus curiae of Atlanta, et al. filed.
39	Jan 24 1986	X	Brief amicus curiae of Detroit, et al. filed. VIDED.
40	Jan 24 1986	X	Brief amicus curiae of NIMLO filed.
41	Jan 24 1986		Lodging received, 4 volumes.
42	Jan 24 1986	X	Brief amicus curiae of Internatl. Assn. of Black Professional Fire Fighters filed.
43	Jan 24 1986	X	Brief amicus curiae of Affirmative Action Coordinating Center, et al. filed.
44	Jan 24 1986	X	Brief amicus curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed. VIDED.
45	Jan 24 1986	X	Brief of respondent Vanguards of Cleveland filed.
46	Jan 24 1986	X	Brief of respondents City of Cleveland, et al. filed.
47	Jan 24 1986	X	Brief amicus curiae of Birmingham, AL filed. VIDED.
48	Jan 24 1986		Brief amicus curiae of California, et al. filed. VIDED.
49	Jan 24 1986	X	Brief amicus curiae of Equal Employment Advisory Council filed.
50	Jan 24 1986	X	Brief amicus curiae of National League of Cities, et al. filed.
51	Jan 24 1986	X	Brief amicus curiae of NAACP Legal Defense and Educational Fund, et al. filed.
52	Jan 24 1986	X	Brief amicus curiae of NOW Legal Defense Func, et al. filed. VIDED.
53	Feb 18 1986	X	Reply brief of petitioner Local No. 93, etc. filed.
54	Feb 19 1986		LODGING by petitioner - copies of Memorandum of Understanding and Rules of Civil Service Commission-Cleveland.
55	Feb 25 1986		ARGUED.

PETITION FOR WRIT OF CERTIORARI

Office Supreme Court, U.S.
FILED
JUN 19 1985
ALEXANDER L. STEVAS
CLERK

84-1999

No.

In the Supreme Court of the United States

October Term, 1984

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, C.L.C.,
Petitioner,

vs.

CITY OF CLEVELAND, *et al.*,

and

VANGUARDS OF CLEVELAND,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. May a District Court adopt provisions in a consent decree purporting to remedy a Title VII violation that it would have had no authority to order as a remedy if the matter had gone to trial?

2. May a municipal employer voluntarily adopt an affirmative action promotional scheme over the objections of an intervenor union duly elected to represent all employees when said promotional scheme adversely affects the rights and interests of the employees and awards relief to minority employees regardless of whether they were actual victims of past racial discrimination?

PARTIES BELOW

In the United States District Court for the Northern District of Ohio, the plaintiffs were the Vanguards of Cleveland; the defendants were the City of Cleveland and George V. Voinovich, Mayor, Vincent Amato, Acting Safety Director, William E. Berry, Fire Chief, and the Civil Service Commission of Cleveland; Local Number 93 were intervenors.

In the United States Court of Appeals for the Sixth Circuit, Local Number 93 was the appellant; the Vanguards of Cleveland, and the City of Cleveland and George V. Voinovich, Mayor, Vincent Amato, Acting Safety Director, William E. Berry, Fire Chief, and the Civil Service Commission of Cleveland were appellees.

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No.

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For the Sixth Circuit

OPINIONS BELOW

The final amended consent decree was entered over objection of the Petitioners on January 31, 1983. A copy of said decree is appended hereto at page A29.

The decision of the United States Court of Appeals for the Sixth Circuit affirming the District Court's entry of the consent decree is reported at 753 F.2d 479 and is appended hereto at page A1.

The decision sought to be reviewed herein was entered on January 23, 1985.

Petitioner's Motion for Rehearing with suggestion for rehearing *en banc* was denied on April 22, 1985.

JURISDICTIONAL STATEMENT

The statutory provision believed to confer jurisdiction upon this Court to review the judgment herein is 28 U.S.C. Section 1254 (1).

STATUTORY PROVISION INVOLVED

The statutory provision involved is 42 U.S.C. § 2000e-5(g) (Section 706(g), Title VII of the Civil Rights Act of 1964). See Appendix p. A41.

STATEMENT OF THE CASE

On October 23, 1980, the Vanguards of Cleveland (hereinafter Vanguards), an association consisting of Black and Hispanic firefighters employed by the City of Cleveland, Ohio, instituted a class action suit, pursuant to the Thirteenth and Fourteenth Amendments, 42 U.S.C. Sec. 1981 and 1983, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e *et seq.*, seeking redress for alleged discrimination by the City of Cleveland Fire Department regarding promotions of minorities within the department.

The complaint alleged that the City had practiced promotional discrimination by (1) the use of unfair written tests and seniority points, (2) the manipulation of retirement dates *vis a vis* the dates upon which promotional eligibility lists expired and (3) the City's failure to hold promotional examinations since April, 1975. The complaint further alleged that only 4.3% of the firefighters who had attained the rank of lieutenant or above were minorities.

The Vanguards sought, *inter alia*, a declaratory judgment that the City had engaged in discriminatory employment practices in the past; an injunction to prohibit such practices in the future and institution of an affirmative action program of hiring and promotion to remedy the effects of past discriminatory practices within the department.

After the filing of the Complaint, the City of Cleveland and the Vanguards attempted to negotiate a settlement. During the pendency of the foregoing negotiations, a motion for leave to intervene on behalf of the Petitioner, Local #93, International Association of Firefighters (I.A.F.F.), A.F.L.-C.I.O. (hereinafter referred to as "Local 93" or "Petitioner"), was filed on June 5, 1981.

In their Complaint, Local 93 asserted that:

> "[P]romotions based upon any criteria other than competence, such as a racial quota system, would deny those most capable from their promotions and would deny the residents of the City of Cleveland from maintaining the best possible fire fighting force."

Thereafter, settlement negotiations between the Vanguards and the City continued, leading to the tendering of a proposed consent decree to the District Court in November, 1981.

On January 7-8, 1982, the District Court held evidentiary hearings to consider intervenor's objections to the decree. As a result of the hearings, the District Court urged further negotiations between the parties.

At a second evidentiary hearing held on April 27, 1982, it appeared that no agreement had been reached. The matter was again referred to the magistrate for further negotiations.

On January 11, 1983, the Vanguards submitted an amended consent decree which was negotiated only by the Vanguards and the City. This decree contained an affirmative action plan for the promotion of Black and Hispanic firefighters on a one-to-one basis with nonminorities.

Petitioner filed objections to the proposed amended consent decree on January 26, 1983. The central thrust of Petitioner's objections was their opposition to court-ordered racial quotas as a remedy for discriminatory practices within the Cleveland Fire Department.

On January 31, 1983, the District Court entered judgment adopting the consent decree over Petitioner's objections.

Thereupon, Petitioner appealed to the United States Sixth Circuit Court of Appeals. In a two (2) to one (1) decision the Court of Appeals affirmed the judgment of the District Court on January 23, 1985.

Petition for rehearing with suggestion for rehearing *en banc* was denied on April 22, 1985.

REASONS IN SUPPORT OF PETITION

The Court-imposed minority promotional quotas contained in the consent decree in the instant case are an impermissible remedy under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* and are at odds with this Honorable Court's decision in *Firefighters Union No. 1784 v. Stotts*, ... U.S. ....., 104 S. Ct. 2576 (1984).

Stotts holds that in ordering relief for Title VII violations, a Court is limited to making whole or granting relief only to individuals who have demonstrated that they have been actual victims of past discrimination.

The majority of the Court of Appeals below viewed this case as involving voluntary action on the part of the City of Cleveland in agreeing to the affirmative action program contained in the consent decree. Having thus categorized the case, the Court of Appeals held that an employer could, without violating Title VII, voluntarily adopt a program benefitting minorities based on mere membership in the disadvantaged class, a question left undecided in *Stotts*.

Clearly, the majority of the Court of Appeals erroneously categorized this case as involving purely voluntary action.

The decree in the instant case interferes with established seniority rights. It mandates that minority firefighters who pass the promotional examination be promoted ahead of nonminority firefighters who would otherwise be entitled to promotion by virtue of seniority and examination scores. Prior to the decree, promotion was based on a combination of objective factors including seniority and examination score ranking. Most significantly, this plan was imposed without regard to whether the beneficiary was an actual victim of discrimination.

Clearly, the scheme contained in the decree is an order of Court and not a purely voluntary action. While negotiated by two parties, namely the Vanguards and the City of Cleveland, the decree became a fully enforceable order when it was adopted by the District Court. The face of the decree itself states: "It is therefore ordered, adjudged and decreed", and thereafter sets forth the duties of the defendant City in complying with the decree. Further, the District Court specifically retained continuing jurisdiction to interpret, modify and enforce the decree through contempt proceedings, if necessary.

The Court of Appeals' majority conclusion that the decree is not "court-ordered action" is at odds with established authority. In *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932), it was stated, "We reject the argument for the intervenors that a decree entered upon consent is to be treated as a contract and not as a judicial act." Even the Circuit from which this case arises has held that "(a) consent decree, however, is also a final judicial order." *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983).

It is also important to note that the Petitioners, who were permitted to intervene below as the representatives of Cleveland firefighters affected by the decree, vigorously opposed and objected to the decree at all stages of the proceedings. Thus, the Court of Appeals' attempt to distinguish the present case from *Stotts* on the basis that *Stotts* invoked "a disputed modification of a consent decree" overlooks the facts and is therefore without merit.

In light of the foregoing, it is beyond question that this case should be governed by principles applicable to Court-ordered relief.

However, since the majority below erroneously viewed this case as involving purely voluntary action, it avoided the limitations set forth in *Stotts* regarding coercive remedial orders pursuant to Title VII.

Section 706(g) of Title VII reads, in pertinent part, as follows:

> "No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or violation of Section 2000e-3(a) of this title."

In *Stotts*, this Honorable Court stated, in citing *System Federation No. 91 v. Wright*, 364 U.S. 642, 652 (1961), that:

> "[T]he District's [sic] Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce, not from the parties' consent to the decree." 104 S. Ct. at 2587 N.9

Since the District Court ordered relief herein that it would have been powerless to award had the matter gone to trial, the decisions of the lower Courts are at odds with the reasoning of *Stotts*.

As Judge Kennedy of the Court of Appeals noted (dissenting): "Since the power to enter a consent decree purporting to enforce a statute is drawn from that statute, it is incongruous to approve a consent decree that goes far beyond the scope of relief permissible under the statute."

Even assuming that the lower Courts properly categorized this case as involving purely voluntary employer action and assuming that the holding that an employer may voluntarily adopt an otherwise impermissible remedy was correct, prior decisions of this Court make clear that the employer may not, in so doing, adversely affect the interests of its employees.

The requirement in 706(g) of Title VII that relief be provided only to those who are actual victims of discrimination acts to safeguard the employment opportunities of nonminority employees who will necessarily be affected by preferential treatment of minorities.

The decree to the instant case awards relief based on mere membership in the disadvantaged class. Moreover, it provides affirmative relief to many minority firefighters who absolutely could not have been victims of past promotional discrimination since they had not, prior to entry of the decree, been eligible for promotion.

In *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), this Court declined to accept government arguments that establishing a pattern and practice of discrimination was tantamount to identifying all class members as victims. Rather, on remand, the District Court was to "make a substantial number of individual determinations in deciding which of the minority employees were actually victims of the company's discriminatory practices." Id., at 371-372.

The decree in the present case mandates protection and affirmative relief that is not "authorized by the needs of safeguarding statutory rights." *System Federation No. 91 v. Wright*, 364 U.S. 642, 648 (1961). By awarding relief to those who are not victims of discrimination, the decree in this case denies nonminorities the protections sought by Congress in Title VII.

Based upon the foregoing, Petitioner respectfully requests that a Writ of Certiorari issue herein and the important issues involved herein be decided by this Court.

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed January 23, 1985)

753 F.2d 479
No. 83-3091

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VANGUARDS OF CLEVELAND, *et al.*,
Plaintiffs-Appellees,

v.

CITY OF CLEVELAND, *et al.*,
Defendants-Appellees,

and

LOCAL NUMBER 93, I.A.F.F., AFL-CIO,
Intervenor-Appellant.

ON APPEAL from the United States District Court for the Northern District of Ohio.

Before: KENNEDY and CONTIE, *Circuit Judges* and COOK, *District Judge*.*

CONTIE, *Circuit Judge*, delivered the opinion of the Court in which COOK, *District Judge* concurred. KENNEDY, *Circuit Judge*, (pp. 19-26) delivered a separate dissenting opinion.

*The Honorable Julian A. Cook, Jr., United States District Judge for the Eastern District of Michigan, sitting by designation.

COFFIN, *Circuit Judge*. Intervenor-City of Cleveland Firefighters Association, Local #93, I.A.F.F., AFL-CIO (Local 93) appeals from the district court's entry of a consent decree which contains a race-conscious, affirmative action plan to increase the number of Black and Hispanic officers within the Cleveland Fire Department. In this appeal, we must first determine whether Local 93 has standing to challenge the consent decree. If standing exists, we must then decide whether the district court abused its discretion by ruling that the decree was "a fair, reasonable and adequate resolution of the claims raised in this action."

I.

On October 23, 1980, the Vanguards of Cleveland (Vanguards), an association of Black and Hispanic firefighters employed by the City of Cleveland, brought a class action under the thirteenth and fourteenth Amendments, 42 U.S.C. §§ 1981 and 1983, and title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, to redress alleged discrimination by the Cleveland Fire Department in its promotion of minority firefighters. The complaint alleged that the City had maintained its discriminatory promotions policy by (1) the use of unfair written tests and seniority points, (2) the manipulation of retirement dates *vis a vis* the dates upon which promotional eligibility lists expired, and (3) the City's failure to hold an examination for promotions since April 1975. The complaint further alleged that only 4.3% of the firefighters who had attained the rank of Lieutenant or above were minorities. In their prayer for relief, the Vanguards sought, *inter alia*, a declaratory judgment that the City had engaged in discriminatory employment practices, an injunction prohibiting the continuation of such practices, and the institution of "an affirmative hiring and promotion program to eliminate the effects of past discriminatory practices."

Shortly after the complaint was filed, counsel for both parties initiated negotiations in an attempt to reach a settlement. In April 1981, Local 93 filed its motion to intervene as of right pursuant to FED. R. CIV. P. 24(a)(2). This motion was granted by the district court on June 5, 1981. Thereafter, Local 93 filed its complaint in which it alleged that it was "the representative of the members of the International Association of Fire Fighters Local #93 all of whom are employees of the Cleveland Fire Department, any and all of whom may be affected by any decision which may be rendered in the instant lawsuit." The complaint also asserted that "[p]romotions based upon any criteria other than competence, such as a racial quota system, would deny those most capable from their promotions and would deny the residents of the City of Cleveland from maintaining the best possible fire fighting force."

In November 1981, the Vanguards and the City filed a proposed consent decree with the district court. On January 7-8, 1982, the district court held an evidentiary hearing to consider the intervenor's objections to the decree. At this time, the parties submitted stipulations of fact which indicated that the percentage of minority residents in the City of Cleveland was 46.9% in 1980, but that the percentage of minority firefighters occupying the ranks of Lieutenant or above was only 4.5%. At the close of the hearing, the district judge urged the parties to engage in "some intensive dialogue" in order to resolve their differences. At a second evidentiary hearing held on April 27, 1982, the district court indicated that no agreement had been reached and that the intervenor's primary objection to the decree was its use of racial quotas to alleviate the

effects of past discrimination. The court later referred this matter to a magistrate for further negotiations.

On November 12, 1982, the magistrate reported that a tentative agreement among counsel for all parties had been reached. This agreement, however, was later rejected by the membership of Local 93. At that point, the Vanguards submitted another proposed consent decree which had been negotiated only by the Vanguards and the City. This decree contained an affirmative action plan for the promotion of Black and Hispanic firefighters which reads as follows:

> (7) Defendants shall as promptly as possible, but no later than January 31, 1983, certify promotional eligibility lists based upon the examinations administered in November 1981, heretofore impounded pursuant to Orders of the Court. Based upon those lists the following promotions shall be made no later than February 10, 1983;
>
> a. Four promotions to the rank of Assistant Chief of Fire.
>
> b. Sixteen promotions to the rank of Battalion Chief.
>
> c. Thirty-two promotions to the rank of Captain of Fire.
>
> d. Sixty-six promotions to the rank of Lieutenant.
>
> (8) All minority members who pass the November 1981 examinations for the ranks of Assistant Chief of Fire, Battalion Chief and Captain of Fire shall be so appointed.

> (9) The sixty-six promotions to the rank of Lieutenant shall be made on the basis of one non-minority to one minority appointee, based on the relative eligible list ranking of the individuals, a minority and non-minority appointment being coupled. Should there be less than thirty-three minority candidates selected for appointment, all sixty-six appointments shall be made, the balance to be filled by non-minority candidates. Any such shortfall as to minority appointments to the rank of Lieutenant shall be made up by promoting, upon the determination of the Defendants that promotion should be made, an equivalent number of minority candidates from the 1984 eligible list as provided for in paragraph 11 hereof, before any further appointments are made from that list.
>
> (10) The promotions to be made to the ranks of Assistant Chief of Fire, Battalion Chief and Captain of Fire shall be made by coupling the highest ranking nonminority and minority appointees, until all successful minority candidates have been appointed.
>
> (11) The eligible lists resulting from the 1981 examinations shall remain in effect until June 15, 1984. Defendants shall schedule additional promotional examinations in sufficient time to promulgate eligible lists to be certified as of June 16, 1984. The eligible lists resulting from the 1984 examinations shall remain in effect until December 15, 1985. Defendants shall schedule additional promotional examinations in sufficient time to promulgate eligible lists to be certified as of December 16, 1985. The eligible lists resulting from the 1985 examinations shall remain in effect for two years.
>
> (12) Seniority within grade shall continue to be determined by the date of appointment. For purposes

of determining seniority ranking of persons receiving their appointment on the same day, seniority shall be determined by their respective ranking on the eligible list from which such promotion was made. For purposes of determining the seniority of those persons coupled for appointment in 1983 pursuant to this Decree, their seniority shall be based upon the order of their appointment from the eligible list regardless of their actual ranking on the eligible list. Any Lieutenants appointed in 1984 pursuant to the shortfall provision of Paragraph 9 shall be the most senior appointees from that list, and shall be ranked among themselves according to their respective ranking on the 1984 list.

(13) In making promotional appointments in such numbers as are deemed appropriate by the City, and consistent with paragraph 15 hereof, Defendants shall maintain the following minority representation incident to the administration of the 1984 and 1985 promotional examinations provided for herein. Following the certification of the 1984 eligible lists the goals shall be 20 percent for Assistant Chief, 10 percent for Battalion Chief, 10 percent for Captain and 23 percent for Lieutenant during the duration of those lists. Following certification of the 1985 eligible lists the goals shall be 20 percent for the ranks above Lieutenant and 25 percent for the rank of Lieutenant during the duration of those lists. For the examinations after the 1981 examinations, if there are less than a sufficient number of minority candidates on the eligible lists to permit Defendants to meet the goals stated herein, promotions will be made by Defendants as determined by them to be necessary for the operation of the Division of Fire, and such promotions shall be

made from eligible non-minority candidates and there shall be no shortfall carry-over to subsequent examinations.

(14) Should more minority candidates qualify for promotion as a result of the three examinations referred to herein than would be subject to promotion by virtue of the terms of this decree such individuals shall be promoted based upon their eligible list ranking. No promotions shall be made or withheld based upon racial considerations other than as required to comply with the terms of this decree.

On January 19, 1983, the district court directed all parties who objected to the proposed consent decree to submit their objections in writing and to show cause why the court should not approve the proposed decree. Local 93 filed a formal objection in which it reiterated its "absolute and total objection to the use of racial quotas . . . ."

On January 31, 1983, the district court adopted the proposed consent decree. The court first found that "[t]he documents, statistics and testimony presented at the January and April 1982 hearings reveal a historical pattern of racial discrimination in promotions in the City of Cleveland Fire Department." The court then found that the affirmative action plan incorporated within the proposed consent decree was not an unreasonable remedy in light of this discrimination. Accordingly, the court adopted the consent decree "as a fair, reasonable, and adequate resolution of the claims raised in this action." Intervenor appeals.

II.

At the outset, the City contends that Local 93 has no standing to appeal the consent decree because the decree

neither interferes with any legal relationship between Local 93 and the settling parties nor binds Local 93 in any other way. *See Utility Contractors Association of New Jersey* [sic], *Inc. v. Toops*, 507 F.2d 83, 85-86 (3d Cir. 1974). Absent such a relationship, the City reasons, Local 93 is, in effect, an *amicus curiae* who has set forth the view of a majority of its members that the affirmative action plan is inappropriate.

We acknowledge that an appealable order may not be challenged by the world at large or even by every party to the suit in which it is entered. It does not follow, however, that a party lacks standing to appeal the entry of a consent decree simply because it is not formally bound or restricted by the agreement. To have standing, a party must be aggrieved by the judicial action from which it appeals. *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 333 (1980); *Machella v. Cardenas*, 659 F.2d 650, 652 (5th Cir. 1981). In addition, this circuit has ruled that a consent decree may be challenged only on the ground that its substantive provisions unlawfully infringe upon the rights of the complainant. *Stotts v. Memphis Fire Department*, 679 F.2d 541, 558 (6th Cir. 1982), *reversed on other grounds*, ... U.S. ....., 104 S. Ct. 2576 (1984).

It may well be that no legally protected interests of non-minority firefighters are adversely affected by this consent decree. For standing purposes, however, this analysis places the cart before the horse. In the present case, regardless of how moderate the preference given to the plaintiff class, and how modest the detriment placed upon the intervenor class, there will be *some* detriment to the latter group. Accordingly, we hold that this intervening party has been sufficiently aggrieved by the district court's order to have standing to challenge the consent decree on the grounds that it unlawfully infringes

upon the constitutional rights of the non-minority firefighters. *See Kirkland v. New York State Department of Correctional Services*, 711 F.2d 1117, 1126 (2d Cir. 1983), *cert. denied*, ... U.S. ....., 104 S. Ct. 997 (1984); *Stotts*, 679 F.2d at 558-59.

III.

A consent decree, although founded on an agreement of the parties, is a final judgment. *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983). When presented with a proposed consent decree, the district court must ascertain only that the settlement is fair, adequate and reasonable. *Id.* at 921. In making this determination, the court must consider, *inter alia*, whether the affirmative action plan is reasonably related to the objective of remedying prior discrimination and whether the plan is fair and reasonable to non-minorities who may be affected by it. *Bratton v. City of Detroit*, 704 F.2d 878, 887 (6th Cir.), *modified on rehearing*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, ... U.S. ....., 104 S. Ct. 703 (1984). A consent decree may not embody an affirmative action plan unless the employer has utilized minorities at a rate less than their proportion in the relevant labor market. *Williams*, 720 F.2d at 921-22. The plan itself cannot require the discharge of non-minority workers and their replacement with minorities. *See United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979).[1] The plan also cannot create an absolute bar to the advancement of non-minority employees. *Id.* Finally, the decree must be temporary in nature and must terminate when the underutilization of minorities has been corrected. *Id.* Once the district court approves the con-

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1. Although *Weber* is a title VII case, this court has used the *Weber* analysis in its discussion of a fourteenth amendment claim. *See Bratton*, 704 F.2d at 887.

sent decree, its decision will be reviewed by this court under the abuse of discretion standard. *Stotts*, 679 F.2d at 555.

Local 93 does not contest the district court's finding of racial discrimination and thus does not deny the existence of a substantial state interest in some remedial action. *See Bratton*, 704 F.2d at 886. Local 93 does contend, however, that this affirmative action plan is unreasonable because it penalizes innocent non-minority firefighters.

This circuit has repeatedly indicated that a simple reduction in non-minority "expectations" does not necessarily make a consent decree unfair or unreasonable. *Williams*, 720 F.2d at 922. Since non-minorities do not have a legally protected interest in promotions which could only be made pursuant to discriminatory employment practices, it follows that the legal rights of non-minorities will not be adversely affected by *reasonable* and *lawful* race-conscious hiring or promotional remedies. *Kirkland*, 711 F.2d at 1126. For the reasons set forth below, we hold that the district court did not abuse its discretion in finding that the consent decree was fair, reasonable and adequate.

The statistical evidence of promotion practices within the Cleveland Fire Department, combined with the City's admission in the consent decree of past discrimination in its hiring and promotion of minority firefighters, clearly established a substantial state interest in some remedial action. The affirmative action remedy embodied in the consent decree is, in our opinion, fair and reasonable to the non-minority firefighters. *See Bratton*, 702 F.2d at 887. The relatively modest goals set forth in the plan represent a permissible and effective means for the City to

achieve its constitutionally permissible ends within the foreseeable future. Moreover, the plan does not require the hiring of unqualified minority firefighters or the discharge of any non-minority firefighters. The plan also does not create an absolute bar to the advancement of non-minority employees. During the first stage of the plan, all promotions are to be made by coupling the highest ranking non-minority and minority candidates based upon the relative eligible list rankings. Thereafter, the City must maintain a specified percentage of minority firefighters at each grade level pursuant to the administration of future promotions examinations. The plan also provides, however, that these percentages are subject to modification if there is an insufficient number of qualified minority candidates.

> For the examinations after the 1981 examinations, if there are less than a sufficient number of minority candidates on the eligible lists to permit Defendants to meet the goals stated herein, promotions will be made by Defendants as determined by them to be necessary for the operation of the Division of Fire, and such promotions shall be made from eligible non-minority candidates and there shall be no shortfall carry-over to subsequent examinations.

Finally, the affirmative action plan will remain in effect for only four years, which indicates that the plan "is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." *Weber*, 443 U.S. at 208.

Local 93 also contends that the plan is unnecessary because there already exists an entry-level affirmative action plan "which will, within the time period contemplated by the decree, operate naturally to increase minority representation within the fire department's upper ranks."

As the number of minority firefighters increases, the Union reasons, the number of minority officers will likewise increase.

We reject the argument that a district court may not authorize an affirmative action plan to end the present effects of past racial discrimination simply because other measures may, over the course of future years, achieve the same result. Such reasoning is entirely too speculative given the "historical pattern of racial discrimination in promotions in the City of Cleveland Fire Department." The district court has determined that this affirmative action plan is reasonably related to the remedial purpose of correcting the racial imbalance in the firefighters' supervisory ranks. The court has also determined that the plan will achieve this result without trammeling the interests of the non-minority firefighters. Upon careful consideration, we hold that the district court did not abuse its discretion in approving the proposed consent decree.

IV.

After hearing oral argument in this case, the Supreme Court handed down its decision in *Firefighters Local Union No. 1784 v. Stotts*, ___ U.S. ___, 104 S. Ct. 2576 (1984). Concerned with the potential impact of *Stotts*, we ordered the parties to submit supplemental briefs addressing the effect, if any, of *Stotts* on this appeal. After considering the supplemental briefs, we conclude that *Stotts* has no effect on this case.

The controversy in *Stotts* involved which employees would first be laid off in the Memphis Fire Department. A prior consent decree had instituted a plan to remedy past discrimination by setting goals for the hiring and promotion of minorities. *See* id. at 2581. Due to a "budgetary shortfall," id., the City of Memphis was forced to layoff

personnel in many of its departments, including the Fire Department. The City announced its intention to layoff employees on a "last hired, first fired" basis in accordance with the City's seniority system. *Id.* at 2581-82. The district court enjoined the City from doing so. The Supreme Court succinctly stated the issue in *Stotts* as "whether the District Court exceeded its powers in entering an injunction requiring white employees to be laid off, when the otherwise applicable seniority system would have called for the layoff of black employees with less seniority." *Id.* at 2585 (footnotes omitted).

On the facts alone, *Stotts* is distinguishable from this case. In *Stotts*, the district court's action had the direct effect of abrogating a valid seniority system to the detriment of non-minority workers. In this case, the consent decree assured the integrity of the existing seniority system. In the past, employees with greater seniority were given a slight advantage in the promotional process. This is the only point at which a seniority system has any bearing on this case. This benefit of seniority is, however, maintained by the consent degree. Paragraph five of the decree provides, in part: "Seniority points will continue to be used as criteria for promotion for the examinations specified in Paragraph 11, jurisdiction being reserved in the Court to determine, upon motion of any party, the propriety of their use thereafter."[2] The consent decree in this case, unlike the injunction in *Stotts*, plainly does not interfere with any seniority rights.

Another point of distinction removes this case beyond the pale of *Stotts* altogether. The district court in *Stotts*

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2. Since the district court has not yet exercised the jurisdiction it reserved to "determine . . . the propriety" of the use of seniority credit, it is unnecessary, indeed inappropriate, to address any actions the district court might take in the future under that reservation of power.

seniority or merit system, or a system which measures earnings by quantity or quality of production."[4] It does not state that an employer is required to make such differentiations. In short, an employer does not, by the mere force of § 703(h), violate title VII by failing to adhere to the procedures *permitted* by that section.

Similarly, § 706(g) merely provides that "[n]o order *of the court shall require*" an employer to give relief to an employee who suffered adverse job action if the action was taken "for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title."[5] By its

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4. Section 703(h) reads in full:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences [sic] are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

See 42 U.S.C. § 2000e-2(h).

5. Section 706(g) provides in full:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may

(Continued on following page)

ordered, over the objection of the City, that the seniority system be ignored in executing layoffs. The Supreme Court expressly rejected any construction of the previous consent decree which would have required the City to layoff non-minorities first. *See* id. at 2585-86. In contrast, the City of Cleveland has agreed to the plan adopted in this case. The fact that this case involves a consent decree and not an injunction makes the legal basis of the *Stotts* decision inapplicable. That cases like the present one are different from cases like *Stotts* was recognized in the *Stotts* opinion itself:

> [T]he Court of Appeals was of the view that the District Court ordered no more than that which the City unilaterally could have done by way of adopting an affirmative action program. Whether the City, a public employer, could have taken this course without violating the law is an issue we need not decide. The fact is that in this case the City took no such action and that the modification of the decree was imposed over its objection.

Id. at 2590 (footnote omitted).

Stotts relied principally on two provisions of title VII, § 703(h) and § 706(g).[3] Both of these provisions, however, merely limit a court's power to award certain relief. Neither makes any conduct illegal. In short, these sections provide a shield to an employer in defending a title VII action, not a sword to an employee claiming that certain conduct violates title VII.

Section 703(h) provides, in part, that "it shall not be an unlawful employment practice" for an employer to differentiate between employees on the basis of a "bona fide

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3. These sections are codified respectively as 42 U.S.C. § 2000e-2(h) and 42 U.S.C. § 2000e-5(g).

very terms, this section provides a limit only on a court's power to award relief. It does not forbid an employer from engaging in certain actions but rather limits what an employer may be forced to do. The quotations in *Stotts* from the legislative history of § 706(g) support our conclusions. These quotations consistently refer to limitations on a court's power to "order" or "require" certain action of an employer; they do not address what action an employer may take voluntarily. *See Stotts*, 104 S. Ct. at 2589-90.[6]

Stotts must also be read in light of *Weber*. *Weber* held that an employer does not violate title VII by voluntarily adopting a reasonable race-conscious plan to increase mi-

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Footnote continued—

be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employer, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

See 42 U.S.C. § 2000e-5(g).

6. *Stotts* also relied on two cases construing these provisions of title VII. *Teamsters v. United States*, 431 U.S. 324 (1977), and *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747 (1976). Both of these cases concerned only the remedial powers of a court in a coercive action. Neither case considered the power of an employer to implement voluntarily a hiring or promotion plan.

nority employment, even when the plan has the effect of overriding the seniority rights of non-minorities. *See Weber*, 443 U.S. at 208-09. Given this holding, *Weber* precludes any notion that title VII absolutely forbids voluntary action by an employer to the detriment of the seniority rights of non-minority workers. To read *Stotts* as invalidating the present plan as impermissible under title VII is to conclude that *Stotts* sub silentio overruled *Weber*.[7] We believe that the Court would have expressly addressed *Weber* had it intended to overrule that decision.[8]

Our colleague in dissent would apparently agree that if this case may be categorized as involving voluntary as opposed to court-ordered action, *Stotts* would not affect our decision. The point of disagreement is whether, as the dissent puts it, this case "should be governed by the principles applicable to court-ordered relief." *See post* at 19.

The dissent's conclusion that those principles are applicable is based on the proposition that a consent decree may not embody provisions that could not be ordered by a court in a wholly coercive action under title VII. Although it is admitted that the Court in *Stotts* "was not directly faced with the question of whether adoption of a consent decree is limited by the remedies available under the statute being enforced," the proposition upon which the dissent relies is said to be a "necessary postulate from which the Court reached its holding." *See post* at 23.

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7. *Stotts did not conclude* that the district court's injunction was unreasonable, but rather that it was impermissible whether it was reasonable or not. Thus, to apply *Stotts* to voluntary employer plans would mean that all such plans are impermissible under title VII no matter how reasonable. This reading of *Stotts* is directly contrary to *Weber*.

8. Indeed, as noted above, the Supreme Court expressly declined to address the question presented in cases like *Weber* and the present one. *See Stotts*, 104 S. Ct. at 2595.

It is by no means clear that the majority in *Stotts* ever reached this conclusion. The majority did quote from *System Federation No. 91 v. Wright*, 364 U.S. 642, 651 (1961), to support its statement that "the District Court's authority to impose a modification of a decree is not wholly dependent on the decree." *See* 104 S. Ct. at 2587 n.9. The *Stotts* majority nowhere says, however, that consent decrees must strictly conform to the scope of relief available to a court in a wholly coercive action; it merely states that "a district court cannot enter a disputed modification of a consent decree in Title VII litigation if the resulting order is inconsistent with that statute." *Id.* (emphasis added). In any event, the *Wright* case involved a decree which had become patently inconsistent with the substantive policy of the underlying statute, a situation far different from the one now before this court. The language from *Wright* on which the dissent relies does not bar a court from adopting a consent decree which provides relief beyond that authorized in the underlying statute.

> The rule contended for by the Companies depends on an overly literal reading of *System Federation No. 91 v. Wright*. The statement that a district court's "authority to adopt a consent decree comes only from the statute which the decree is intended to enforce" . . . means only that the focus of the court's attention in assessing the agreement should be the purposes which the statute is intended to serve, rather than the interests of each party to the settlement.

Citizens for a Better Environment v. Gorsuch, 718 F.2d 1117, 1125 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 2668 (1984) (citation omitted).[9] Indeed, other courts have flatly

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9. *Gorsuch* upheld a consent decree which contained provisions that went "beyond statutory requirements" against a challenge to its propriety under *Wright*. *See* 718 F.2d at 1125.

rejected the dissent's position: "Consent decrees need not be limited to the relief that a court could provide on the merits." *See Sansom Committee v. Lynn*, 735 F.2d 1535, 1538 (3d Cir. 1984) (citing *Pacific Railroad v. Ketchum*, 101 U.S. 289, 297 (1879)). *See also Sansom*, 735 F.2d at 1547 (Garth, Circuit Judge, dissenting) ("the consent decree may even prescribe relief beyond that authorized by the statute").

Moreover, if the *Stotts* majority meant to say what the dissent believes it said, it is hard to explain the majority's statement that "it is reasonable to believe that the 'remedy', which it was the purpose of the decree to provide, would not exceed the bounds of the remedies that are appropriate under Title VII, *at least absent some express provision to that effect*." *See* id. at 2586 (emphasis added). If it was a "necessary postulate" for *Stotts* that consent decrees must strictly conform to court-ordered title VII remedies, then the majority surely would have simply said so when discussing whether the initial decree supported the injunction. Instead, it believed it necessary to construe the decree to not include remedies beyond those which a court may order. Finally, although the majority in *Stotts* was somewhat ambiguous on this point, the three dissenters and Justice Stevens were not. They unequivocally rejected our colleague's position. *See* 104 S. Ct. at 2594 n.3 (Stevens, J., concurring); id. at 2605 n.9 (Blackmun, J., dissenting).

That *Stotts* looked to the limits of a court's powers under title VII is not surprising, since the City strenuously objected to the court's action. In *Stotts*, the decree was essentially coercive and consensual in name only. Accordingly, the Court did not analyze the case as involving voluntary action. In the present case, the decree reflects

voluntary action[10] and must be analyzed as a voluntary action case.

Since nothing in title VII, as interpreted in *Stotts*,[11] forbids this consent decree and since, as we have already determined, *see supra* at 8-11, the decree is proper under the standards recognized in cases such as *Bratton*, the judgment of the district court is AFFIRMED.

KENNEDY, *Circuit Judge*, dissenting. In *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984), the Supreme Court held that when fashioning relief for a violation of Title VII a court was limited to making whole those found to have been victims of past discrimination. Relief thus could not be given based merely on membership in the disadvantaged class. The Court explicitly left open the question of whether the employer could, without violating Title VII, voluntarily adopt an affirmative action program offering benefits based on membership in the disadvantaged class. 104 S. Ct. at 2590. The majority reasons that since two of the parties in the present case agreed to entry of the consent decree, this case is identical to the voluntary action situation the Supreme Court declined to address in *Stotts* but which is controlled by prior decisions of this Circuit. I dissent because the language and reasoning of the Supreme Court in *Stotts* indicate that

10. To be sure, a consent decree is a judicial "order" and may not be inconsistent with the underlying statute. It is one thing, however, to say that decrees must be consistent with the underlying statute and quite another to say that they must mimic court-ordered remedies in every particular. If the decree had contained a remedy which violated non-minorities' rights under title VII, it plainly would have been inconsistent with the statute. Since this plan is within the limits set in *Weber* (and those set in cases such as *Bratton*, where the fourteenth amendment is relevant), however, it does no violence to non-minorities' legal rights.

11. We also note that our reading of *Stotts* is consistent with *Wygant v. Jackson Board of Education*, 746 F.2d 1152, 1157-58 (6th Cir. 1984).

the consent decree in the present case should be governed by the principles applicable to court-ordered relief rather than those applicable to purely voluntary actions.

In *Stotts* the Supreme Court reviewed a District Court order preliminarily enjoining the City of Memphis from following its established seniority system when laying off firefighters. The District Court had earlier entered a consent decree for the purpose of remedying a pattern or practice of discrimination on the basis of race in hiring and promotion in violation of Title VII. The Court first rejected the position, accepted by this Circuit, that the injunction did no more than enforce the consent decree. 104 S. Ct. at 2585-86. The Court then agreed with this Circuit that the injunction was not needed to prevent a new violation of Title VII, since the city's layoff plan was pursuant to a bona fide seniority system and thus did not constitute an unlawful employment practice under § 703(h) of Title VII. 104 S. Ct. at 2587. Finally, the Court considered this Circuit's reasoning that the entry of a consent decree should not restrict a court's authority to order further relief necessary to correct a past violation of Title VII. The Supreme Court also rejected this argument because, relying on *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) and § 706(g) of Title VII, it concluded that if the case had gone to trial and the plaintiffs had proven discrimination the District Court could not have awarded relief based on "mere membership in the disadvantaged class." 104 S. Ct. at 2588-90.

This holding compels the conclusion that if the present case had gone to trial and the plaintiffs had proven a pattern or practice of discrimination in promotions in violation of Title VII, the District Court could not have ordered relief equivalent to the provisions of the consent decree. Contrary to the majority's suggestion, majority opinion at

12-13, this case cannot be distinguished from *Stotts* on the grounds that *Stotts* involved abrogation of a seniority system while this case does not. The consent decree in this case in effect gives minority firefighters superseniority over all non-minority firefighters for promotion purposes, at least until certain quotas are reached. Before the decree, promotions were based on a combination of factors that included seniority and examination scores. The decree now requires that minority firefighters who pass the examination be promoted ahead of non-minority firefighters who would otherwise be entitled to promotion by virtue of their seniority and examination scores. Each promotion list based in part on seniority, has been split into two. It therefore cannot be said that the consent decree "plainly does not interfere with any seniority rights."

More importantly, the rationale of the Supreme Court in *Stotts* is in no way limited to orders that award competitive seniority. The Court in both *Stotts* and *Teamsters* relied on § 706(g) of Title VII, which limits the relief that may be ordered to remedy a Title VII violation. That section provides in part:

> No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination . . . .

42 U.S.C. § 2000e-5(g). The language of this section applies equally well to the Cleveland Fire Department's promotional system as it did to the layoff plan in *Stotts* or the job allocation system in *Teamsters*. The consent decree requires that minority firefighters be promoted even

though those firefighters may have been refused advancement for only non-discriminatory reasons.

The Supreme Court relied on § 706(g)'s policy "to provide make-whole relief only to those who have been actual victims of illegal discrimination." *Stotts*, 104 S. Ct. at 2589. The provisions of the consent decree in the present case clearly provide make-whole relief to those who have not been victims of illegal discrimination. Many of the minority firefighters affected by the decree had never been eligible for promotion before the decree was entered, and thus could not have been the victims of discrimination in promotions. If this case had gone to trial, therefore, it is clear that the District Court could not have ordered such blanket relief.

The question presented by this case, therefore, is whether the District Court could adopt provisions in a consent decree purporting to remedy a Title VII violation that it would have had no authority to order as a remedy had the matter gone to trial.

The answer to this question may be found in the Supreme Court's opinion in *Stotts*. In a footnote, the Court stated that:

> the District Court's authority to impose a modification of a decree is not wholly dependent on the decree. "[T]he District's [*sic*] Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce," not from the parties' consent to the decree. *System Federation No. 91 v. Wright*, 364 U.S. 642, 651 (1961).

104 S. Ct. at 2587 n.9.[1]

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1. This principle has previously been recognized by this Circuit in *Williams v. Vukovich*, 720 F.2d 909, 923 (6th Cir. 1983): "A consent decree which seeks to enforce a statute must be consistent with the public objectives sought to be attained by Congress."

System Federation involved a suit brought under the Railway Labor Act, which then prohibited employer discrimination against non-union employees. The defendants, a railroad and several unions, agreed to entry of a consent decree providing that the railroad would not discriminate against non-union employees. The statute was then amended to permit such discrimination in the form of a union shop. Upon request of the unions, the District Court refused to modify the consent decree to allow a union shop, reasoning that non-union shops were not illegal and that the parties' agreement should be enforced. The Supreme Court reversed, holding that to allow the consent decree to continue unmodified "would be to render protection in no way authorized by the needs of safeguarding statutory rights." 364 U.S. at 648. The Court reasoned that "[t]he parties cannot, by giving each other consideration, purchase from a court of equity a continuing injunction." 364 U.S. at 651.[2] The Court quoted its decision in *United States v. Swift & Co.*, 286 U.S. 106, 114-15 (1932): "The result is all one whether the decree has been entered after litigation or by consent. . . . We reject the argument . . . that a decree entered upon consent is to be treated as a contract and not as a judicial act." 364 U.S. at 650-51.

The Supreme Court in *Stotts* was not directly faced with the question of whether adoption of a consent decree is limited by the remedies available under the statute

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2. I do not interpret *System Federation* to require that before entering a consent decree a district court must resolve the merits of the dispute and find that the terms of the consent decree would in fact have constituted an appropriate remedial order. *See Swift & Co. v. United States*, 276 U.S. 311, 327 (1928) (failure to establish that violation actually occurred before entry of consent decree "does not go to the power of the court to adjudicate between the parties"). Section 706(g), in contrast, expressly limits the power of a court to order relief of a certain type under any circumstances.

being enforced. The Court did, however, use the proposition that a consent decree is so limited as a necessary postulate from which the Court reached its holding that modification of a decree over an objection is so limited. The three dissenting Justices and one concurring Justice in *Stotts* interpreted the majority opinion as saying that a consent decree cannot provide relief that would be unavailable after trial. *See Stotts*, 104 S. Ct. at 2605 n.9 (Blackmun, *J.*, dissenting) ("The Court's analysis seems to be premised on the view that a consent decree cannot provide relief that could *not* be obtained at trial."); *Stotts*, 104 S. Ct. at 2594 n.3 (Stevens, *J.*, concurring in the judgment) ("The Court seems to suggest that a consent decree cannot authorize anything that would not constitute permissible relief under Title VII."). That five Justices nonetheless joined the opinion of the Court,[3] despite knowing of this interpretation of their opinion, indicates that the Court meant what it said.[4]

The rationale used by the Supreme Court in *Stotts* applies equally as well as to a consent decree as to an injunction following trial. The Court relied on § 706(g) of Title VII, which provides that "[n]o order of the court" shall provide relief to employees not affected by discrim-

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3. Justice O'Connor, who joined in the opinion of the Court, specifically voiced her agreement with the Court's application of Title VII to limit proper modifications of the consent decree. 104 S. Ct. at 2593 n.2 (O'Connor, *J.*, concurring).

4. The majority finds it "hard to explain" the Supreme Court's failure in *Stotts* to note Title VII's limitations on permissible court orders during its discussion of whether the initial decree in *Stotts* supported the trial court's ruling. Majority opinion at 19. The statement in *Stotts* quoted by the majority was made entirely within the context of a discussion of what the parties' intentions were in agreeing to the initial decree. Whether the parties so agreed is entirely a different question than whether a court had the power to enforce that agreement by entering a decree.

motion. (Emphasis added.) Contrary to the majority's suggestion, opinion at 15-16, the consent decree in this case is clearly an "order of the court." This Circuit said in *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983), that "[a] consent decree, however, is also a final judicial order." The decree on its face recites, "IT IS THEREFORE ORDERED, ADJUDGED AND DECREED," and then explains in detail what actions the defendants are required to take to comply with the order. That the defendants agreed to entry of the order does not make it any less an order.

The adoption of the agreement as a judicial decree has different consequences than voluntary compliance with the agreement. Any failure to comply with the decree is enforceable through contempt proceedings, rather than a suit for breach of contract. The District Court retains continuing jurisdiction to interpret and modify the decree. The decree also affects the rights of the firefighters' union and non-minority firefighters. A non-minority firefighter could challenge the city's voluntary actions on equal protection or Title VII grounds, but is foreclosed from collaterally challenging a court decree. Under Ohio's public employees collective bargaining law, effective April 1984 (after the consent decree was entered), voluntary changes in the city's promotion policy might be subject to collective bargaining with a certified representative. Ohio Rev. Code §§ 4117.01-.23. A city could avoid its duty to bargain by seeking adoption of a consent decree. While a consent decree does have some aspects of an agreement, there can be no doubt that a consent decree is not identical to a voluntary action.

The differences between a purely voluntary affirmative action plan and a court-ordered plan were made evident by this Circuit's decision on rehearing in *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir.), *modified on reh'g*, 712 F.2d 222 (6th Cir. 1983). In *Bratton* non-minority employees challenged a voluntary affirmative action promotions plan. The District Court not only upheld the plan but incorporated it into a decree. This Circuit on rehearing vacated the decree because what the city should be required to do was not at issue, and was not necessarily coextensive with what the city would be permitted to do. This Court reasoned that the body adopting the plan "must remain the 'front line actor' primarily responsible for the plan's operation." 712 F.2d at 223. *Bratton* therefore is consistent with my conclusion that a court decree, even when it incorporates an affirmative action plan voluntarily agreed to, nonetheless is improper unless it is based on that the employer may be required to do as a remedy for past discrimination.

In addition to the language of § 706(g), the Supreme Court in *Stotts* relied on Title VII's legislative history. The Court quoted remarks of Senator Humphrey:

> Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require [hiring,] firing [, or promotion] of employees in order to meet a racial "quota" or to achieve a certain racial balance.

104 S. Ct. at 2589 (quoting 110 Cong. Rec. 6549 (1964)) (bracketed words Sen. Humphrey's omitted by Supreme Court.) This passage makes it clear that § 706(g) was intended to limit the power of a court to require certain actions, not just the scope of remedies that a court must impose. Section 706(g) thus limits the power of the District Court to require a quota-based promotion policy.

When a voluntary affirmative action program is challenged under Title VII, a court need answer only one question: whether that program itself violates Title VII. This is the question addressed in *United Steelworkers v. Weber*, 443 U.S. 193 (1979) and left unanswered in *Stotts*. When a court-ordered remedy for a prior Title VII violation is challenged under Title VII, however, two questions must be addressed: (1) whether the remedy itself violates Title VII; and (2) whether the remedy is within the scope of relief permissible under § 706(g) to correct a Title VII violation. The majority in this case has failed to address the second of these questions. Section 706(g) does indeed provide a "shield" rather than a "sword" in a Title VII action[1] see majority opinion at 14, but a shield is precisely what the intervenors in this case need to challenge the District Court's power to award relief. Under the Supreme Court's decision in *Stotts*, a court may not enter relief of the type embodied in the consent decree in this case. Since the power to enter a consent decree purporting to enforce a statute is drawn from that statute, it is incongruous to approve a consent decree that goes far beyond the scope of relief permissible under the statute. Accordingly, the District Court's judgment adopting the consent decree should be reversed and the case remanded for further proceedings in accordance with this opinion.

I concur in part II of the majority opinion, which concerns standing. Otherwise, I respectfully dissent.

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1. Section 706(g) does, however, provide a much different type of shield than does § 703(h). Section 703(h) provides that application of a bona fide seniority system does not constitute an unlawful employment practice, and thus is relevant to the question of whether a Title VII violation has occurred. Section 706(g), in contrast, limits the type of relief that may be ordered once a violation has been established.

AMENDED CONSENT DECREE OF THE DISTRICT COURT

(Filed)

Case No. C80-1964

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE VANGUARDS OF CLEVELAND,
Plaintiff,

vs.

THE CITY OF CLEVELAND, *et al.*,
Defendants.

AMENDED CONSENT DECREE

WHEREAS there has been a long history of discrimination against minority persons in the hiring practices and the promotion practices of the City of Cleveland Division of Fire;

WHEREAS prior litigation has confirmed the existence of this history of discrimination [*see Headen v. City of Cleveland*, United States District Court, Northern District of Ohio, Eastern Division, No. C73-330] but has failed to effectively eliminate the present effects of such discriminatory practices;

WHEREAS many of the practices used in the past to discriminate against minority applicants for promotion

in the Cleveland Division of Fire were substantially similar to those used by the Cleveland Division of Police;

WHEREAS the Cleveland Division of Police is presently subject to an order issued following several years of litigation which governs the promotion practices of said Division [see *Shield Club v. City of Cleveland*, United States District Court, Northern District of Ohio, Eastern Division, Nos. C72-1068, C77-346];

WHEREAS the plaintiff and the defendants are desirous of avoiding extended and costly litigation relating to the Cleveland Division of Fire;

WHEREAS the plaintiff and the defendants are desirous of effectuating a remedy which will eliminate all vestiges of discrimination in the promotion practices of the City of Cleveland Division of Fire;

WHEREAS discrimination which affects any segment of the population of the City of Cleveland is detrimental to the well-being and the interests of all the citizens of the City of Cleveland;

WHEREAS a proposed consent decree was previously tendered to this Court on November 5, 1981 upon which hearings were held on January 6 and 7, 1982 and April 27 and 28, 1982;

WHEREAS prior to the hearings on the first proposed consent order, all members of the proposed class were duly served notice and given an opportunity to present evidence at the hearings;

WHEREAS the Intervenor, the International Association of Firefighters Local No. 93, did object to the proposed consent order and plaintiffs, defendants, and Intervenor were given full opportunity and all did present evidence

bearing upon whether the Court should enter or deny the proposed consent order;

WHEREAS at the Court's request, Intervenor, plaintiffs, and defendants have engaged in extended discussions in an effort to reach a consent decree to which all could agree, said discussions occurring as early as November of 1981 and continuing through the end of November of 1982 and the most recent series of these discussions involving over forty hours of meetings mediated by United States Magistrate David S. Perelman and participated in fully by Intervenor's Executive Board and Intervenor's counsel;

WHEREAS at the conclusion of the discussions mediated by Magistrate Perelman a revised consent decree was finalized and submitted to Intervenor's membership for ratification; said revised decree was thereupon rejected by Intervenor's membership by a vote of 660 to 89;

WHEREAS all conceivable efforts at reaching a tripartite agreement have been exhausted;

WHEREAS the within decree is patterned very closely upon the revised decree negotiated under the supervision of Magistrate Perelman and reflects substantial concessions by the plaintiffs and the defendants when compared to the first proposed consent order, such concessions reflecting concerns raised by Intervenor; and

WHEREAS the continued pendency of this action and the failure to rectify the circumstances which gave rise to it are divisive factors within the Division of Fire, seriously affecting the morale of all firefighters and impeding the proper and efficient operation of the Division rendering it imperative that this litigation be resolved fairly and expeditiously.

IT IS NOW THEREFORE ORDERED, ADJUDGED AND DECREED:

(1) The Plaintiffs have stated claims under the Thirteenth and Fourteenth Amendments to the United States Constitution; 42 U.S.C. §1981; 42 U.S.C. §1983; 42 U.S.C. §2000d; and Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e, *et seq.* The jurisdiction of this Court is properly invoked under 28 U.S.C. §§1331, 1343(3) and (4) and 2000 (3) *et seq.*

(2) The following definitions are adopted for the purpose of this decree:

a. "Minority" persons shall mean Black and Hispanic persons.

b. "Hispanic" refers to all persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race.

c. "The City" refers to the City of Cleveland, a party Defendant herein.

d. "Division of Fire" refers to the City of Cleveland Division of Fire.

e. "Firefighters" refers to all uniformed personnel employed by the Division of Fire.

f. "Defendants" refers to the named Defendants in this litigation and their successors in office including the City of Cleveland.

g. "Officers" refers to all firefighters occupying the rank of Lieutenant or above.

(3) This action is determined to be a class action pursuant to Rules 23(a) and (b)(2) of the Federal Rules of Civil Procedure. The class consists of all Black and

Hispanic firefighters presently employed by the Division of Fire and all Blacks and Hispanics who in the future will be employed as firefighters by the Division of Fire.

(4) The Defendants shall utilize only such promotion criteria as are non-discriminatory and demonstrably job related in compliance with Title VII of the 1964 Civil Rights Act and the form Guidelines on Employee Selection Procedures, as hereafter amended. Such standards shall also be utilized in establishing the pass fail level established for any future promotional examinations.

(5) A firefighter shall be eligible to compete for promotion to Lieutenant if at the time scheduled for certification of the eligible lists specified in Paragraph 11 hereof such firefighter will have at least three years of seniority from his date of appointment as a firefighter; and, an officer shall be eligible to compete for promotion to the next higher rank if at the time scheduled for the certification of the eligible lists specified in Paragraph 11 such officer will have at least one year in grade from the date of appointment to his present rank. Seniority points will continue to be used as criteria for promotion for the examination specified in Paragraph 11, jurisdiction being reserved in the Court to determine, upon motion of any party, the propriety of their use thereafter.

(6) No further promotions shall be made on the basis of the expired 1975 promotional eligible lists.

(7) Defendants shall as promptly as possible, but no later than January 31, 1983, certify promotional eligible lists based upon the examinations administered in *November 1981*, heretofore impounded pursuant to Orders of the Court. Based upon those lists the following promotions shall be made no later than *February 10, 1983*:

a. Four promotions to the rank of Assistant Chief of Fire.

b. Sixteen promotions to the rank of Battalion Chief.

c. Thirty-two promotions to the rank of Captain of Fire.

d. Sixty-six promotions to the rank of Lieutenant.

(8) All minority members who pass the November 1981 examinations for the ranks of Assistant Chief of Fire, Battalion Chief and Captain of Fire shall be so appointed.

(9) The sixty-six promotions to the rank of Lieutenant shall be made on the basis of one non-minority to one minority appointee, based on the relative eligible list ranking of the individuals, a minority and non-minority appointment being coupled. Should there be less than thirty-three minority candidates selected for appointment, all sixty-six appointments shall be made, the balance to be filled by non-minority candidates. Any such shortfall as to minority appointments to the rank of Lieutenant shall be made up by promoting, upon the determination of the Defendants that promotion should be made, an equivalent number of minority candidates from the 1984 eligible list as provided for in paragraph 11 hereof, before any further appointments are made from that list.

(10) The promotions to be made to the ranks of Assistant Chief of Fire, Battalion Chief and Captain of Fire shall be made by coupling the highest ranking non-minority and minority appointees, until all successful minority candidates have been appointed.

(11) The eligible lists resulting from the 1981 examinations shall remain in effect until June 15, 1984. Defendants shall schedule additional promotional examinations in sufficient time to promulgate eligible lists to be certified as of June 16, 1984. The eligible lists resulting from the 1984 examinations shall remain in effect until December 15, 1985. Defendants shall schedule additional promotional examinations in sufficient time to promulgate eligible lists to be certified as of December 16, 1985. *The eligible lists resulting from the 1985 examinations shall remain in effect for two years.*

(12) Seniority within grade shall continue to be determined by the date of appointment. For purposes of determining the seniority ranking of persons receiving their appointment on the same day, seniority shall be determined by their respective ranking on the eligible list from which such promotion was made. For purposes of determining the seniority of those persons coupled for appointment in *1983* pursuant to this Decree, their seniority shall be based upon the order of their appointment from the eligible list regardless of their actual ranking on the eligible list. Any Lieutenants appointed in 1984 pursuant to the shortfall provision of Paragraph 9 shall be the most senior appointees from that list, and shall be ranked among themselves according to their respective ranking on the 1984 list.

(13) In making promotional appointments in such numbers and are deemed appropriate by the City, and consistent with paragraph 15 hereof, Defendants shall maintain the following minority representation incident to the administration of the 1984 and 1985 promotional examinations provided for herein. Following the certification of the 1984 eligible lists the goals shall be 20 percent for Assistant Chief, 10 percent for Battalion Chief, 10 percent for Captain and 23 percent for Lieutenant during the duration of those lists. Following certification of the 1985

eligible lists the goals shall be 20 percent for the ranks above Lieutenant and 25 percent for the rank of Lieutenant during the duration of those lists. These goals may be achieved, if necessary, by promoting minority candidate(s) out of eligible list rank within their particular grade. For the examinations after the 1981 examinations, if there are less than a sufficient number of minority candidates on the eligible lists to permit Defendants to meet the goals stated herein, promotions will be made by Defendants as determined by them to be necessary for the operation of the Division of Fire, and such promotions shall be made from eligible non-minority candidates and there shall be no shortfall carry-over to subsequent examinations.

(14) Should more minority candidates qualify for promotion as a result of the three examinations referred to herein than would be subject to promotion by virtue of the terms of this Decree such individuals shall be promoted based upon their eligible list ranking. No promotions shall be made or withheld based upon racial considerations other than as required to comply with the terms of this Decree.

(15) The matter of manning (i.e., staffing levels), is not at issue under the pleadings herein, and this Consent Decree shall not be construed as in any manner or to any degree touching upon that issue, except as specified in paragraphs 7 and 9 herein.

(16) Defendants shall supply Plaintiff's and/or Intervenor's counsel with progress reports of compliance with each paragraph of the within Decree upon request at intervals no more frequent than semi-annually. Such report shall include the name and a minority or non-minority designation of all applicants for promotion.

(17) This Decree shall be severable and a subsequent determination of the invalidity of any one paragraph, subparagraph or portion thereof shall not affect the remaining provisions.

(18) This Decree shall be deemed controlling in the event of any conflict between it and the language of any state constitution, statute, charter provision, city ordinance or administrative rule. However, this Decree shall be read in harmony with any of the aforesaid if such a reading is possible and reasonable and will not frustrate the purposes of this decree.

(19) Prior consent decree drafts, consent decree proposals, correspondence, and communications shall not be admissible into evidence for the purpose of interpreting the provisions of this Decree.

(20) Defendants may utilize the "one in three" rule prescribed by the City Charter of Cleveland to the extent that its use does not frustrate the purposes of this Decree.

(21) *In the event that there is delay in the adoption of this decree of more than one month in the date of promotion as specified in paragraph 7 herein, the plaintiffs and the defendants shall submit an amendment to this decree specifying new dates for achievement of the procedures specified in this decree; however, to the extent possible, respective time periods between new dates shall conform to the time periods specified in this decree.*

(22) *Defendants will not oppose an application by plaintiff's counsel for reasonable attorney's fees representing compensation for legal services performed and reimbursement for necessary expenses incurred through and including the date on which this decree is accepted by the Court for entry. This provision shall not be deemed to*

preclude a supplemental application by plaintiff's counsel should additional attorney's time be required or additional necessary expenses incurred.

(23) Defendants will bear the cost of this action.

(24) Exclusive jurisdiction is reserved in the Court for all purposes of enforcement, modification, or amendment of this Decree upon the application of any party, including Intervenor, either to guarantee the continuing effectuation of the goal of eliminating the ongoing vestiges of past discrimination alleged by Plaintiff as it impacts upon promotion within the Division of Fire, or to terminate any further jurisdiction upon a satisfactory showing by any party, including Intervenor, that the aims and objectives of the decree have been achieved and can reasonably be expected to be fulfilled in the future, or to alter the terms of this Decree in order to meet unanticipated changes and circumstances. Without limiting this general reservation, the Court specifically reserves jurisdiction with regard to any court challenges which may be presented to any of the promotional examinations or eligible lists provided for herein.

IT IS SO ORDERED.

THOMAS D. LAMBROS
Judge

JUDGMENT ENTRY OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed January 23, 1985)

No. 83-3091

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VANGUARDS OF CLEVELAND, *et al.*,
Plaintiffs-Appellees,

v.

CITY OF CLEVELAND, *et al.*,
Defendants-Appellees,

LOCAL NUMBER 93, I.A.F.F., AFL-CIO,
Intervenor-Appellant.

Before: KENNEDY and CONTIE, *Circuit Judges*; and COOK, *District Judge.*

JUDGMENT

ON APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed.

It is further ordered that Appellees recover from Intervenor-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk
/s/ John P. Hehman
Clerk

42 U.S.C. 2000e-5

§ 2000e-5. Enforcement provisions

Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
JUL 18 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1959

In the Supreme Court of the United States

October Term, 1984

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, C.L.C.,
Petitioner,

vs.

CITY OF CLEVELAND, *et al.*,

and

VANGUARDS OF CLEVELAND,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a district court may enter a decree which grants relief to minority employees who are not identified individual victims of illegal racial discrimination, where the employer has voluntarily consented to such entry, where the district court has found a historical pattern of racial discrimination in promotions by the employer and where the decree creates a plan to remedy the effects of that history of discrimination.

PARTIES TO THE PROCEEDING BELOW

Respondents, the City of Cleveland, et al., are satisfied with Petitioner's Statement.

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No. 84-1999

In the Supreme Court of the United States

October Term, 1984

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, C.L.C.,
Petitioner,

vs.

CITY OF CLEVELAND, *et al.*,

and

VANGUARDS OF CLEVELAND,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS AND JUDGMENTS BELOW

Petitioner omitted the district court's Memorandum Opinion and Order of January 31, 1983, a copy of which is appended hereto at page A1.

JURISDICTIONAL STATEMENT

Respondents, the City of Cleveland, et al., are satisfied with Petitioner's Statement.

STATUTORY PROVISION INVOLVED

Respondents, the City of Cleveland, *et al.*, are satisfied with Petitioner's Statement.

STATEMENT OF THE CASE

Respondents, the City of Cleveland, *et al.*, add as follows to the Statement of Petitioner.

The Complaint filed on October 23, 1980 by plaintiff, The Vanguards of Cleveland ("Vanguards"), alleged, *inter alia*, that the City of Cleveland (the "City") had discriminated against Blacks and Hispanics (hereinafter referred to collectively as "minorities" or "minority persons") for decades, and that such discrimination had resulted in a great disparity between the proportions of minorities and non-minorities in the promoted ranks of the City's Division of Fire.

On April 27, 1981, Petitioner, Local 93, International Association of Firefighters, AFL-CIO, C.L.C. ("Local 93"), through its president, filed a motion to intervene, which the district court granted on June 5, 1981. Local 93 filed its Complaint on July 7, 1981. It alleged that its members might be affected by the outcome of the action and it asserted the public interest in an efficient, well-trained and properly staffed firefighting force. Local 93's Complaint did not allege that its contractual relations with the City could in any way be affected by the outcome of the action.

After evidentiary hearings were held, and on the same day the district court approved the amended consent decree proffered by the Vanguards and the City, the district court issued a Memorandum Opinion and Order

finding that "[t]he documents, statistics, and testimony presented at the [evidentiary] hearings reveal a historical pattern of racial discrimination in promotions in the City of Cleveland Fire Department[.]" and stating that the proffered amended consent "decree creates a plan that will last through 1987 to remedy the effects of this history of discrimination." The Memorandum Opinion and Order stated that the use of a quota system for the promotion of minorities over a four year period "is not unreasonable in light of the demonstrated history of racial discrimination in promotions in the City of Cleveland Fire Department[.]" and that "[i]t is neither unreasonable nor unfair to require non-minority firefighters who, although they committed no wrong, benefited from the effects of the discrimination to bear some of the burdens of the remedy."

ARGUMENT

This Court should deny the writ of certiorari requested by Local 93 because the opinion of the Court of Appeals below is fully consistent with this Court's decision in *Firefighters Local Union No. 1784 v. Stotts*, ___ U.S. ___, 104 S. Ct. 2576 (1984) (hereinafter referred to as "*Stotts*"), where this Court clearly implied that the consent of an employer to a decree would justify its entry even though such decree grants relief to minority persons who have not been identified individually as victims of illegal racial discrimination.

In *Stotts*, this Court considered and rejected several rationales offered to support the trial court's injunction, which prevented the City of Memphis from laying off its firefighters in accordance with its seniority system. One of those rationales was that the injunction did no more than to enforce the terms of an agreed-upon order (104

S. Ct. at 2565). If the fact of consent were irrelevant to a court's power to grant relief to individuals not shown to have been victims of illegal discrimination, this Court would have stated as much. However, this Court rejected the consent rationale on the facts before it, stating that "there is no mention of layoffs or demotions within the four corners of the decree; nor is there any suggestion of an intent to depart from the existing seniority system or from the City's arrangements with the Union." 104 S. Ct. at 2586.

In essence, then, Local 93 seeks to have this Court decide an issue which was implicitly decided in *Stotts*, i.e., whether a district court has the power to effect a settlement consented to by parties to a Title VII litigation where the beneficiaries of the settlement have not been demonstrated to have been individual victims of illegal discrimination. The *Stotts* analysis of the consent rationale raised in that case confirms the Court's prior recognition, in *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981), that Congress intended to encourage voluntary settlements of Title VII suits. That is precisely what the City did here.

The alternative basis upon which Local 93 seeks a writ of certiorari is based upon its erroneous "assum[ption] that the lower Courts . . . characterized this case as involving purely voluntary employer action." (Petition, page 7, emphasis added). The short answer to Local 93's contention is that the City's consent to the entry of the Amended Consent Decree occurred in the context of the facts underlying the District Court's recognition, at page 2 of its Memorandum Opinion and Order entered on the same day as the Amended Consent Decree, that there was evidence "reveal[ing] a historical pattern of racial discrimination in the City of Cleveland Fire Department." The limited quota system to which the City consented did no more than

agree to "a plan that will last through 1987 to remedy the effects of this history of discrimination." (*Id.* at page 3). Therefore, this case does not present the question whether a "purely voluntary" decision by an employer to effectuate an affirmative action program is consistent with Title VII.

For the reasons stated above, Respondents, City of Cleveland, et al., respectfully request that the Court deny Local 93's request for the issuance of a writ of certiorari.

Respectfully submitted,

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APPENDIX

MEMORANDUM OPINION AND ORDER OF THE DISTRICT COURT

(Dated January 31, 1983)

No. C 80-1964

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE VANGUARDS OF CLEVELAND,
et al.,
Plaintiffs,

v.

THE CITY OF CLEVELAND, *et al.*,
Defendants,

and

LOCAL NUMBER 93, I.A.F.F.,
AFL-CIO,
Intervenor.

MEMORANDUM OPINION AND ORDER

LAMBROS, *District Judge*

This action was brought pursuant to 42 U.S.C. §1981, 42 U.S.C. §1983, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*, to redress alleged racial discrimination in promotions within the City of Cleveland Fire Department. Plaintiff the Vanguards of Cleveland (Vanguards) is an association of the Black and Hispanic firefighters employed by defendant City of Cleveland.

Shortly after the complaint was filed, counsel for the Vanguards and the City began to conduct negotiations to

explore settlement of this lawsuit. On June 5, 1981 City of Cleveland Firefighters, Association Local Number 93, I.A.F.F., AFL-CIO (Local 93), was granted leave to intervene. The negotiations between the Vanguards and the City continued and resulted in the lodging of a proposed consent decree on November 2, 1981. Local 93 was not privy to the discussions that had led to the proposed decree.

At evidentiary hearings held in January and April 1982 the Vanguards and the City jointly urged the approval of the proposed consent decree as fair, reasonable, and adequate. Local 93 was the sole objector to the adoption of the decree.

During the hearings it was learned that similar litigation in Atlanta, Georgia had been resolved amicably with the cooperation and participation of the firefighters' union. It became apparent that the accord reached in Atlanta might provide the basis for a tripartite settlement. Therefore, at the close of the hearings, ruling on the proposed consent decree was deferred and the matter was referred to United States Magistrate David S. Perelman to explore the potential for an agreement among the three parties.

On November 12, 1982 Magistrate Perelman reported that an amended proposed consent decree had been reached. He indicated that the negotiations were conducted with a realization by all parties that achieving a settlement involves compromising on matters that could be won at trial and on appeal. He also indicated that the proposed decree was achieved "as the result of a high level of cooperation by all counsel." For their efforts the parties and their attorneys are to be commended. With respect to the proposed decree itself, the Magistrate reported that the Vanguards and the City had agreed to

the proposal, but that it was to be submitted to Local 93 for referendum. Local 93 later voted to reject the proposal and it was therefore withdrawn from consideration.

On January 11, 1983 the Vanguards lodged a second amended proposed consent decree and moved for its approval. The proposal, which was negotiated between the Vanguards and the City, does not differ greatly from the one negotiated under the guidance of Magistrate Perelman.

On January 19, 1983 the City was ordered to notify the members of the plaintiff class of the terms of the proposed decree. In addition, persons who sought to object to the proposal were ordered to submit their objections in writing and to show cause why further evidentiary presentations, if sought by the objector, were necessary and not duplicative of the January and April 1982 hearings.

Local 93 filed a formal objection to the approval of the January 11th proposed decree. In addition, three individual memberr of the Local have voiced their objection to the decree in personal letters. The basis of the formal objection is the Local's opposition to the use of racial quotas in the settlement of this action. This sentiment is echoed in the individuals' letters. Local 93 contends that the use of quotas will increase racial disharmony within the fire department and raise serious questions concerning the quality of fire protection in the City of Cleveland.

Local 93 did not seek to support its objection with evidence in addition to that presented at the 1983 [sic] hearings. Therefore, there is no need for further evidentiary proceedings and plaintiffs' motion for approval of the January 11th proposed decree is in a posture for decision.

The documents, statistics, and testimony presented at the January and April 1982 hearings reveal a historical

pattern of racial discrimination in promotions in the City of Cleveland Fire Department. The January 11th proposed decree creates a plan that will last through 1987 to remedy the effects of this history of discrimination.

Under the proposal the City is prohibited from using criteria for promotion unless they are non-discriminatory and job-related. Seniority points are to be used for evaluating promotions through 1987, but jurisdiction is reserved to determine their use thereafter. In addition, jurisdiction is reserved to amend or modify the plan if necessary.

"Minority" is defined in the proposed decree as Black or Hispanic individuals. The proposed decree provides that all minorities who presently hold the ranks of Lieutenant and above and who passed the November 1981 examinations shall be promoted to the next higher rank. Sixty-six promotions shall be made immediately to the rank of Lieutenant, thirty-three of which shall be minorities. In the event less than thirty-three minorities passed the November 1981 examination, the difference will be made up from the next examination before any other promotions are made.

Promotional examinations shall be held in 1984 and 1985. During the tenure of the lists established by these examinations the following levels of minority representation must be maintained as the result of promotions to each rank:

	Lieutenant	Captain	Battalion Chief	Assistant Chief
1984 List	23%	10%	10%	20%
1985 List	25%	20%	20%	20%

The 1985 list shall be maintained for two years.

That quotas may be used for limited periods of time to remedy past employment discrimination is well-recognized in this Circuit. *See United States v. Masonry Contractors Association of Memphis, Inc.*, 497 F.2d 871, 877 (6th Cir. 1974); *United States v. Local Union No. 212 International Brotherhood of Electrical Workers*, 472 F.2d 634, 636 (6th Cir. 1973); and *Arnold v. Ballard*, 390 F. Supp. 723, 736 (N.D. Ohio 1975), *on remand* 448 F. Supp. 1025 (1978) (Lambros, J.).

The original proposed consent decree in this action established a quota system to be maintained over a nine-year period. The amended proposed decree presently under consideration establishes quotas over a four-year term. While the concerns articulated by Local 93 may be valid, the use of a quota system for the relatively short period of four years is not unreasonable in light of the demonstrated history of racial discrimination in promotions in the City of Cleveland Fire Department. It is neither unreasonable nor unfair to require non-minority firefighters who, although they committed no wrong, benefited from the effects of the discrimination to bear some of the burden of the remedy. Furthermore, the amended proposal is more reasonable and less burdensome than the nine-year plan that had been proposed originally.

The objection of Local 93 is hereby overruled. Plaintiffs' motion to approve the proposed consent decree lodged on January 11, 1983 is granted. The January 11, 1983 proposed consent decree is hereby adopted as a fair, reasonable, and adequate resolution of the claims raised in this action. The defendant City is ordered to implement the January 11, 1983 consent decree forthwith.

The Clerk of Court is hereby ordered to release to Jeffrey C. LeBarron, Assistant Director of Public Safety

for the City of Cleveland, the reports of final raw score results and the answer sheets for each examination, which were placed in his custody under seal pursuant to the order of United States Magistrate David S. Perelman dated September 30, 1982.

This action is terminated.

IT IS SO ORDERED.

/s/ THOMAS D. LAMBROS
United States District Judge

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
AUG 9 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1999

In the Supreme Court of the United States

October Term, 1984

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, C.L.C.,
Petitioner,

vs.

CITY OF CLEVELAND, *et al.*,

and

VANGUARDS OF CLEVELAND,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should exercise its discretion to decline review because a voluntarily adopted affirmative action plan which, for a period of short duration, provides carefully tailored race-conscious relief to minorities previously subjected to discriminatory promotion practices, and which is approved by the District Court, is consistent with Title VII and the previous decisions of this Court.

2. Whether this Court should exercise its discretion to decline review because of factors which render this case an especially inappropriate vehicle to reach the reasons for review tendered by the Petitioner and by the Government.

3. Whether this Court should exercise its discretion to decline review because prior decisions of this Court, particularly *Firefighters Union No. 1784 v. Stotts*, may not reasonably be interpreted to limit a District Court's authority to approve a consent decree which embodies a voluntary affirmative action plan which benefits the victims of prior discriminatory practices following findings by the Court of a long history of discrimination.

PARTIES TO THE PROCEEDING BELOW

Respondent, The Vanguards of Cleveland, is satisfied with Petitioner's Statement.

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No. 84-1999

In the Supreme Court of the United States

October Term, 1984

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, C.L.C.,
Petitioner,

vs.

CITY OF CLEVELAND, *et al.*,

and

VANGUARDS OF CLEVELAND,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS AND JUDGMENTS BELOW

Petitioner omitted the District Court's Memorandum Opinion and Order of January 31, 1983, a copy of which is appended at page A1 to Respondent City of Cleveland's Brief in Opposition to Petition for Certiorari.

JURISDICTIONAL STATEMENT

Respondent, Vanguards of Cleveland, is satisfied with Petitioner's Statement.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provision involved is the Fourteenth Amendment to the United States Constitution. The statutory provisions involved are 42 U.S.C. §§1981, 1983 and 2000e-5(g) (Section 706(g), Title VII of the Civil Rights Act of 1964). See App., p. A1; §706(g) is reproduced at Pet. App., p. A41.

STATEMENT OF THE CASE

On October 23, 1980 the Vanguards of Cleveland (the "Vanguards") filed its complaint alleging, *inter alia*, long-standing and continuing discrimination in violation of the Fourteenth Amendment, 42 U.S.C. §§1981 and 1983, and Title VII of the 1964 Civil Rights Act. Early in the litigation the parties entered into a lengthy series of discussions which eventually led to the filing of a proposed consent decree with the District Court which embodied a voluntary affirmative action plan on the part of the City of Cleveland.

Prior to the filing of the proposed consent decree, Local 93 of the International Association of Firefighters ("Local 93") was permitted to intervene in the litigation on behalf of its members. When served with a copy of the proposed consent decree, Local 93 objected to the affirmative action portions of the decree. Thereupon evidentiary hearings were held, preceded by an opportunity for additional discovery, at which time the District Court received extensive testimony, exhibits and stipulations of fact pertaining to the existence of discrimination within the Cleveland Fire Department and to the reasonableness of the proposed decree. At no time during these evidentiary

hearings, nor at any time thereafter, did the Petitioner offer its collective bargaining agreement with the City into evidence nor make a claim based on that agreement. [App., pp. A4-A5.]

Following the conclusion of these evidentiary hearings the District Court strongly encouraged the parties to attempt to renegotiate the decree to meet the concerns of Local 93. Further proceedings were adjourned to permit an extended and intense period of tripartite negotiations before a United States Magistrate selected by the District Judge. A tentative settlement was reached by all three parties (including the elected leadership of Local 93) on a decree which embodied a relatively mild affirmative action plan to be implemented by the City. The tentative settlement was facilitated in part by the City's willingness to expand considerably the number of promotions it had previously intended to make in order to accommodate the interests of both minority and non-minority firefighters.[1]

Unfortunately the membership of the Petitioner refused to approve the amended version of the affirmative action plan which had been provisionally agreed to by the plaintiffs, the City and the leadership of the Union. Thereupon the revised plan, despite the lack of Local 93's concurrence, was agreed to by the Vanguards and the City and submitted to the District Court for approval.[2] Petitioner was afforded the opportunity for an evidentiary hearing on the

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1. The affirmative action plan which emerged from these negotiations was specifically tailored to meet many of the objections raised by Local 93 and represented a compromise of the interests of all three parties. It was considerably less vigorous than the original affirmative action plan from the Vanguards' perspective.

2. The amended consent decree was for all intents and purposes identical to the plan that had evolved out of the tripartite discussions before the United States Magistrate. [Pet. App., p. A31; Resp. City's App., p. A3.]

question of the Court's approval of the amended affirmative action plan. Petitioner declined this invitation and instead filed written objections to the limited racial preferences contained in the amended plan. The District Court approved an amended consent decree embodying the plan over the Petitioner's objections.

In the amended affirmative action plan contained in the consent decree approved by the District Court, Respondent City of Cleveland admitted that "there has been a long history of discrimination against minority persons in the hiring practices and the promotion practices of the City of Cleveland Fire Department" and that "prior litigation . . . confirmed the existence of this history of discrimination." [Pet. App., p. A29.] In addition to this admission, the District Court specifically found in its opinion of January 31, 1983 that the "documents, statistics and testimony presented at the January and April, 1982 hearings reveal a historical pattern of racial discrimination in promotions within the Cleveland Fire Department."[3]

The affirmative action plan embodied in the decree resulted in forty-three minority promotions in February of 1983 from among those minorities who qualified on the basis of their scores on a promotional examination. Each of the minorities promoted was a long-standing member of the Division of Fire who had been subjected to the very

3. The record was quite extensive and included startling statistical evidence of extreme racial imbalance over a forty year period. For example in 1980 the percentage of minority residents in the City of Cleveland was 46.9% but the percentage of minority firefighters occuping the ranks of Lieutenant or above was only 4.5%. The access of minorities and non-minorities to promotions within the Department was documented over a period of many years and was shown to be grosaly stacked in favor of non-minorities. Anecdotal evidence was offered from several witnesses. The Petitioner offered no rebuttal evidence to this showing and on appeal before the Court of Appeals did not contest the District Court's findings.

promotional practices which the City admitted to be discriminatory and which the Court expressly found to be discriminatory. On the same day a large number of non-minority promotions were made (seventy-five in number). Of the total promoted in February of 1983, 36% were minority and 64% were non-minority.[4]

This first stage of the affirmative action plan was followed by a second stage, likewise designed to benefit those members of the Division of Fire who had been victimized by the discriminatory promotion process. For a period of rather short duration—namely two and one half years—the second stage created remedial goals to be achieved, if necessary, by the promotion of qualified minority candidates ahead of non-minority candidates. These goals are expressed as percentages of minorities in each of the upper ranks of the Division of Fire and are as follows:

	Lieutenant	Captain	Battalion Chief	Assistant Chief
1984 List	23%	10%	10%	20%
1985 List	25%	20%	20%	20%

Depending upon the pattern of retirements and certain other factors, these goals can result in the promotion of a ranking minority candidate ahead of a higher ranking non-minority candidate. Promotions made in compliance with the 1984 goals have already been completed and promotions in compliance with the 1985 goals can be expected to be completed in late 1985 or early 1986. Thereafter, the affirmative action portion of the consent decree can be expected to have no further substantial impact and the affirmative provisions of the decree will officially expire in 1987.

4. It should be noted that following the February, 1985 promotions, numerous additional non-minority promotions were made by the City.

The District Court found that the affirmative action aspects of the consent decree were reasonable in light of their operation for only "the relatively short period of four years" and in light of "the demonstrated history of racial discrimination in promotions in the City of Cleveland Fire Department." [Resp. City's App., p. A5.] The Petitioner appealed to the Court of Appeals for the Sixth Circuit, expressly conceding the appropriateness of the District Court's findings of discrimination and arguing that moderate racial preferences, even under such compelling circumstances as were presented in this case, should not be countenanced. The Sixth Circuit rendered its decision on January 23, 1985. Thereafter Petitioner filed a motion for rehearing *en banc*. The United States filed an amicus curiae brief in support of the request for rehearing but rehearing was denied on April 22, 1985.

SUMMARY OF ARGUMENT

The voluntary affirmative action plan approved by the District Court falls squarely within well-established guidelines for race-conscious relief under Title VII set forth by this Court in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). The remedial plan was approved only after an express admission by the City of racial discrimination and after findings of discrimination by the District Court. It provides modest race-conscious relief to minorities previously subjected to discriminatory promotion practices. It treads lightly on the interest of non-minority firefighters and is of relatively short duration compared to the plan sanctioned by this Court in *Weber*.

Not only is the affirmative action plan approved by the District Court consistent with Title VII, it is supported by findings of intentional discrimination and therefore additionally finds support in the Fourteenth Amendment and

42 U.S.C. Sections 1981 and 1983. These independent and adequate grounds for the decision of the Court of Appeals are set forth in the consent decree itself and were acknowledged by the District Court in its opinion approving the remedial plan. For this reason this Court is urged to decline review in this case as the arguments raised by Petitioner and the Government, even if correct, will not prove dispositive.

This Court is further urged to decline review because the Government's argument as to why review should be granted is permeated with a faulty factual premise, namely that a collective bargaining agreement is implicated in this litigation. In fact there is no collective bargaining agreement at stake in this litigation; the record is devoid of any such agreement and no claims have ever been made by the Union on the basis of such an agreement.

Unlike *Firefighters Union No. 1784 v. Stotts*, ____ U.S. ____, 104 S. Ct. 2576 (1984), the race-conscious remedies approved by the District Court clearly benefit actual victims of the practices which the City admitted were discriminatory and which the District Court found to be discriminatory. For this additional reason review should be declined as the arguments tendered by the Petitioner and the Government regarding their interpretation of §706(g) need not be reached in order to affirm the decision of the Court of Appeals.

Finally, should it be necessary to reach the §706(g) argument raised by the Petitioner and the Government, this Court should decline review because there is no conflict within the various Courts of Appeals that have addressed this argument and because the reasoning adopted by the Court of Appeals in rejecting an expansive reading of §706(g)—especially in the consent decree context—is sound.

ARGUMENT

1. THIS COURT SHOULD EXERCISE ITS DISCRETION TO DECLINE REVIEW BECAUSE A VOLUNTARILY ADOPTED AFFIRMATIVE ACTION PLAN WHICH, FOR A PERIOD OF SHORT DURATION, PROVIDES CAREFULLY TAILORED RACE-CONSCIOUS RELIEF TO MINORITIES PREVIOUSLY SUBJECTED TO DISCRIMINATORY PROMOTION PRACTICES, AND WHICH IS APPROVED BY THE DISTRICT COURT, IS FULLY CONSISTENT WITH TITLE VII AND PREVIOUS DECISIONS OF THIS COURT.

This Court has strongly indicated support for reasonable race-conscious remedies when measured against challenges based upon the Constitution [*Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Fullilove v. Klutznick*, 448 U.S. 448 (1980)] and challenges based upon Title VII [*United Steelworkers of America v. Weber*, 443 U.S. 193 (1979)]. For this reason any analysis of race-conscious remedies under Title VII must begin with *Weber*.[5] While *Weber* involved a voluntarily adopted affirmative action plan which, unlike the instant case, was embodied in a collective bargaining agreement and not a consent decree, the Courts of Appeals have repeatedly applied *Weber* principles to an analysis of affirmative action plans which are incorporated by the employer into a consent decree.[6]

5. While *Weber* involved a private employer, the Courts of Appeals have uniformly applied the *Weber* analysis to actions taken by public employers, such as the City of Cleveland. *See Devereaux v. Geary*, ____ F.2d ____, 38 FEP Cases 23 (1st Cir. 1985) and cases cited therein at p. 28, n.5.

6. *See e.g., Turner v. O'*, 759 F.2d 817, 823 (11th Cir. 1985) and the Court of Appeals decision in the instant case. [Pet. App., p. A9-A10.]

In *Weber*, Kaiser and the union entered into a collective-bargaining agreement which contained an affirmative action plan that was designed to remedy a conspicuous racial imbalance in the ranks of skilled craftworkers. Production workers were admitted into a training program on the basis of seniority, with the proviso that at least 50% of the new trainees were to be black.[7] This Court upheld the plan, even though it was race-conscious. Although the Court declined to "define in detail the line of demarcation between permissible and impermissible affirmative action plans", 443 U.S. at 208, the Court identified certain reasons why the Kaiser plan was permissible. As shown below, the factors which made the Kaiser plan acceptable are clearly present in the plan approved by the District Court in this case.

First, the affirmative action plan approved by the District Court was demonstrably remedial in nature. In *Weber* the Court took judicial notice of the history of discrimination in the craft industry and looked to the racial composition of the employer's 1974 workforce, finding those two elements to be sufficient to determine that the plan was remedial in character. Here, the Court may likewise take judicial notice of the history of racial discrimination in municipal safety forces,[8] however this inquiry is not necessary as the District Court received an admission from the employer of a "long history of discrimination against minority persons in the . . . promotion practice of the City of Cleveland Fire Department" and expressly

7. This procedure was to remain in effect until the percentage of black craftworkers in the plan approximated the percentage of blacks in the local workforce.

8. The lower court decisions confirming this historical reality are voluminous and too numerous to include in a Brief in Opposition to a Petition for Certiorari. *See e.g., Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *cert. denied* 104 S. Ct. 703 (1984).

found that "the documents, statistics and testimony . . . reveal a historic pattern of discrimination in promotions within the Cleveland Fire Department." In 1982 for example there were only 10 minority individuals holding positions in the promoted ranks of the Cleveland Fire Department, a mere 4.5% of the officer positions in the Department. By contrast the percentage of minority persons in the City of Cleveland in 1980 was 47%. Whereas 25% of the non-minority firefighters in the Department were in supervisory positions, only 7% of the minority firefighters in the Department held supervisory positions.[9] Petitioners never contested the evidentiary showing of discrimination before the District Court or on appeal. [Pet. App., p. A10.]

Clearly the plan approved by the District Court was designed to break down, at least in part, these rigid patterns of discrimination in promotions. The plan provided for an initial group of promotions resulting in 43 minority promotions and 75 non-minority promotions in February of 1983.[10] Then for the following two promotion eligible lists, the plan set goals also designed to afford minorities further participation in the supervisory ranks of the Department:

	Lieutenant	Captain	Battalion Chief	Assistant Chief
1984	23%	10%	10%	20%
1985	25%	20%	20%	20%

9. In addition, promotion "flow" evidence was received by the District Court that showed, for example, that minorities had a likelihood of being promoted to Lieutenant which was only 39.7% that of whites.

10. The largest impact was felt in the rank of Lieutenant to which 33 minorities were promoted. This feature itself was designed to break down patterns of discrimination as the rank of Lieutenant is the entry level rank into the supervisory levels of the Fire Department. As noted earlier, the February, 1983 promotions were followed by numerous additional promotions of only non-minority personnel.

All the limited race-conscious relief was designed to benefit those very firefighters who had been victimized by the City's long-standing discriminatory promotion practices.

Second, this affirmative action plan does not "unnecessarily trammel" the interests of non-minority firefighters. This Court upheld the plan in *Weber* because no whites would be discharged and 50% of the training programs were to be filled by whites, creating no absolute bar to the advancement of whites. If anything, this plan creates far less of an infringement on the interests of non-minorities than did the Kaiser plan. This is true primarily because the Petitioner participated in the three-way negotiations which resulted in the very plan which Petitioner now seeks to have this Court review. During the course of these negotiations, considerable alterations were made to accommodate the interests of white firefighters. Of particular note is the fact that the City of Cleveland agreed to vastly increase the number of planned promotions by numbers roughly equivalent to the anticipated number of minority promotions under the plan, thereby permitting both minorities and non-minorities to enjoy access to the higher ranks. In addition, the numbers themselves make it clear that this plan is exceedingly unintrusive in terms of the interests of white firefighters. In February of 1983, when the largest number of minority promotions were made, whites nonetheless received 64% of the promotions. Similarly, during the periods of time in which the 1984 and 1985 goals apply, non-minorities have continued to enjoy wide promotional opportunities as 75-90% of all the supervisory positions within the Department are untouched by the plan approved by the District Court. Therefore the plan places no serious limitations on the advancement of non-minorities. As expressly found by the District Court:

> It is neither unreasonable nor unfair to require non-minority firefighters who, although they committed no wrong, benefited from the effects of the discrimination to bear some of the burden of the remedy. [Resp. City's App., p. A5.]

Finally, the plan meets the temporariness requirement of *Weber*. Based upon the criteria for termination of the plan in *Weber* and the small size of the training program in 1974, it is clear that the plan in *Weber* was intended to last many years longer than the plan in this case.[11] Here, because of the manner in which promotions are generally made within the Cleveland Fire Department, the plan will have been fulfilled for all intents and purposes by early 1986.[12] Officially it terminates in 1987. Construed most broadly, the plan extends for a period of between four and five years. Unquestionably, the duration of this plan falls within the meaning of temporariness as used in *Weber*. This again was the express finding of the District Court: "the use of a quota system for the relatively short period of four years is not unreasonable in light of the demonstrated history of racial discrimination in promotions in the Cleveland Fire Department." [Resp. City's App., p. A5.]

For the foregoing reasons, the affirmative action plan which the District Court approved in this case is well within the parameters of race-conscious remedial relief

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11. In *Weber* the plan was to continue in existence until the percentage of black craftworkers approximated the percentage of blacks in the labor market. In 1974, when the plan was instituted, the Kaiser plant had 273 craftworkers, only five of whom were black. 443 U.S. 198. During 1974, the first year of operation of the plan, 13 employees were selected for the training program, seven of whom were black and six of whom were white.

12. The very short duration of the plan is a factor which Respondent believes weighs against the granting of review in this case.

permitted under Title VII as previously enumerated by this Court in *Weber*.[13] As set forth in the following section, this plan is also fully consistent with the standards for the review of race-conscious plans under the Constitution of the United States.

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13. While a consent decree admittedly has some attributes of court ordered relief, principally by virtue of its enforceability through the remedy of contempt, it is much more closely aligned with a voluntary affirmative action plan promulgated wholly apart from pending litigation. Indeed the Petitioner admits as much in its statement of the "Questions Presented for Review." An opposite interpretation invites parties to resolve lawsuits by subterfuge: the plaintiffs dismiss without prejudice and in return the defendant employer promulgates a voluntary affirmative action plan.

No affirmative action plan, whether promulgated by a legislative body or an administrative body, or whether embodied in a collective bargaining agreement, conciliation agreement or consent decree, is likely to be "purely" voluntary. Normally there is some pressure placed on the employer to act and therefore the pressure of pending litigation hardly distinguishes an affirmative action plan promulgated as a result of a lawsuit from an affirmative action plan promulgated pursuant to pressure from, for example, a labor union as in *Weber*. Nor is the remedy of contempt as significant as Petitioner and the Government contend. Most agreements are judicially enforceable; for example, there have been numerous EEOC lawsuits brought to compel the specific performance of EEOC conciliation agreements. In such cases, the contempt remedy is only one step removed.

The interpretation contended for by the Petitioner and the Government would permit an anomaly whereby the EEOC could enter into conciliation agreements embodying race-conscious relief as a result of a mere probable cause finding under Title VII, but the EEOC could not obtain consent judgments which embody similar relief, even where as here, they are preceded by judicial findings of discrimination.

II. THIS COURT SHOULD EXERCISE ITS DISCRETION TO DECLINE REVIEW BECAUSE OF FACTORS WHICH RENDER THIS CASE AN INAPPROPRIATE VEHICLE TO REACH THE REASONS FOR REVIEW ADVANCED BY THE PETITIONER.

A. There Exist Independent And Adequate Grounds For The District Court's Approval Of The Affirmative Action Portions Of The Consent Decree Pursuant To The Fourteenth Amendment And 42 U.S.C. §§1981, 1983.

The Petitioner's sole challenge to the District Court's approval of the affirmative action plan in this case is grounded on a strained interpretation of Title VII of the 1964 Civil Rights Act. Nowhere in its Petition does Local 93 address the alternative grounds which support the District Court's decision in this matter, namely the Fourteenth Amendment and 42 U.S.C. §§1981, 1983. The United States in its amicus brief similarly ignores the alternative grounds for the District Court's opinion.[14] In fact Respondent Vanguards' complaint was filed under all three alternative provisions. The amended consent decree approved by the District Court contains specific references to these additional provisions and clearly does not rest unilaterally upon the shoulders of Title VII. The District Court acknowledged these alternative grounds by its reference to *Arnold v. Ballard*, 390 F. Supp. 723, 736 (N.D. Ohio

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14. The United States alludes to this basis for relief in n.10 at page 9 of its Brief by making reference to its Fourteenth Amendment argument in *Wygant v. Jackson Board of Education*, No. 84-1340. The Government states that "[I]f our position on the Equal Protection Clause issue raised in *Wygant* is correct, the relief awarded in the present case is unconstitutional." On the contrary however, since the position of the United States in *Wygant* is premised upon the absence of findings of past discrimination, the Government's argument in that case is inapposite.

1975), on remand 448 F. Supp. 1025 (1978), a non-Title VII case.

In *Regents of the University of California v. Bakke*, 438 U.S. 265, 305 (1978) (opinion of Powell, *J.*), this Court stated that an affirmative action plan containing classifications based on race may be utilized when it serves a compelling governmental interest. *Id.* at 298. One such compelling interest is the "interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination". *Id.* at 307. The discrimination may be identified by judicial, legislative, or administrative findings of constitutional or statutory violations. After such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated. *Id.* at 307, 308. In this case there has been a judicial finding of a long history of discrimination in promotions within the Cleveland Fire Department. Therefore, under *Bakke*, 438 U.S. 307-08, there is a sufficient predicate for the implementation of race-conscious affirmative relief.

Consistent with *Bakke* and also with *Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980) (opinion of Burger, *C.J.*), the race-conscious plan involved in this case is narrowly tailored to meet its goal so as to "work the least possible harm on other persons competing for the benefit." *Bakke*, 430 U.S. at 308. As Chief Justice Burger wrote in *Fullilove*:

> It is not a constitutional defect in this program that it may disappoint the expectations of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a "sharing of the burden," by innocent parties

is not impermissible. 448 U.S. at 484 (citations omitted).

As expressly found by the District Court and like the minority set aside in *Fullilove*, the provisions of the City's plan require non-minorities to shoulder only a minor burden. [Resp. City's App., p. A5.]

In sum, the affirmative action plan which Petitioner seeks to have this Court review under Title VII is fully supported by the Fourteenth Amendment and likewise by 42 U.S.C. §§1981 and 1983.[15] See also the analysis of the reasonableness of this plan by the Court of Appeals in this case. [Pet. App., pp. A10-11.] (The dissent does not contest this aspect of the majority opinion). The sole thrust of Petitioner's argument (as well as the Government's argument) is that §706(g) of Title VII of the 1964 Civil Rights Act expressly limits the power of the District Court to approve a consent decree which embodies affirmative action provisions voluntarily agreed to by the City. By its

15. While the District Court's opinion does not expressly use the term "purposeful" in describing its findings of discrimination against the City of Cleveland, no other interpretation of the District Court's findings is conceivable given the character of the record and the proceedings below. Following an express admission by the City of Cleveland of a "long history of discrimination against minority persons in . . . the promotion practices of the City of Cleveland Fire Department," the development of an extensive record and the failure of the Petitioner to offer any evidence to attempt to rebut the evidentiary showing made by the Vanguards, the District Court's findings of "a historical pattern of racial discrimination in promotions" can only be construed as a finding of purposeful discrimination.

The District Court's findings are consistent with this Court's guidelines for findings of purposeful discrimination which have evolved over the past decade. See *e.g.*, *Washington v. Davis*, 426 U.S. 256 (1976); *Arlington Heights v. Metropolitan Housing Authority Development Corporation*, 429 U.S. 252 (1977); *Rogers v. Lodge*, 458 U.S. 613 (1982). See also *Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977). Of course such findings are reversible only based upon the clearly erroneous standard of judicial review. *Pullman-Standard v. Swint*, 456 U.S. 273 (1982); *Rogers v. Lodge*, *supra*.

terms, §706(g) does not affect actions under the Fourteenth Amendment and Sections 1981 and 1983. Therefore there clearly exist alternative independent grounds for the District Court's judgment which strongly favor a decision to decline review in this case.

B. The Record Does Not Support The Government's Assertion That The Consent Decree Conflicts With A Collective Bargaining Agreement.

The United States has attempted to introduce a new element into these proceedings, a claim, not heretofore made by the Petitioner, that the District Court's approval of the affirmative action plan in this case is defective because the Court's order interferes with the collectively bargained-for rights of the members of Local 93. See Brief for the United States as Amicus Curiae, pp. 12-20. The fundamental premise of the Government's argument is that the employer agreed to alter the collective bargaining agreement with its employees, without the union's consent.[16]

16. Significantly, even where there are collectively bargained-for rights at stake, such rights can be overridden where, as here, the union is afforded a full opportunity to be heard and there is a judicial determination of discrimination. See *EEOC v. Safeway Stores, Inc.*, 714 F.2d 567, 576-80 (5th Cir. 1983) and *United States v. City of Miami*, 664 F.2d 435 (5th Cir. 1981), the two Fifth Circuit cases chiefly relied upon by the Government in its argument at pp. 16-20 of its Brief. As stated by this Court in *W. R. Grace v. Rubber Workers*, 461 U.S. 757, 771 (1983): "*Absent a judicial determination*, the Commission, not to mention the Company, cannot alter the collective bargaining agreement without the Union's consent." (emphasis added) In this case the Union was extended the full panoply of procedural rights before the judicial findings of determination were entered and before the affirmative action plan was approved. Indeed the union was a party to the very negotiations which produced the affirmative action plan at issue in this case. For these additional reasons, the Government's contentions are clearly wrong and misleading. Compare *Zipes v. TWA, Inc.*, 455 U.S. 385, 400 (1982).

In point of fact, the "collective bargaining agreement" alluded to by the Government was never made a part of the record of these proceedings. No claim has ever been made by the Petitioner Union that its collectively bargained-for rights were at stake in this litigation.[17] This is a patent distortion of the record by the Government. [See App., pp. A3-A5.] Since at least fifty percent of the Government's argument for why review should be granted is based upon a fundamentally faulty factual premise, Respondent submits that this is an additional persuasive reason why this Court should exercise its discretion to decline to review this case.[18]

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17. The Petitioner's Complaint in Intervention makes no reference to a collective bargaining agreement. Not only was the agreement not introduced into evidence, it was not even proffered.

18. In a similar vein, Local 93 suggests that the voluntary affirmative action provisions of the consent decree interfere with "established" seniority rights. Petitioner's Brief, p. 5. (This argument is echoed by the Government at p. 10 of its Brief.) Candidates for promotion are afforded a very limited credit for seniority which, when added to their examination scores, establishes ranking on a promotion eligible list. By permitting the promotion of somewhat lower ranking minority employees, the Petitioner argues that the consent decree interferes with seniority rights in contravention of *Stotts*.

This argument of the Petitioner has never before been raised in these proceedings (not even in Petitioner's Brief in Support of its Petition for Rehearing in the Court of Appeals) and is not supported by the record. The seniority credits alluded to by the Petitioner are not a "condition of employment pursuant to a bona fide seniority system" pursuant to §703(h) of Title VII of the 1964 Civil Rights Act. They were not bargained for collectively and as noted above, Petitioner has never asserted any rights under its collective bargaining agreement with the City. The limited impact which seniority credit has on the promotion process is not clearly described in the record although it is clear that seniority credit (or "points") has been used intermittently over the years at the discretion of the Civil Service Commission of the City of Cleveland. (Testimony of Eugene Guyton). See the opinion of the Court of Appeals in this case. [Pet. App., p. A13.]

III. LIKEWISE, THIS COURT SHOULD DECLINE REVIEW BECAUSE PRIOR DECISIONS OF THIS COURT, PARTICULARLY FIREFIGHTERS UNION NO. 1784 v. STOTTS, MAY NOT REASONABLY BE INTERPRETED TO LIMIT A DISTRICT COURT'S AUTHORITY TO APPROVE A CONSENT DECREE WHICH EMBODIES A VOLUNTARY AFFIRMATIVE ACTION PLAN WHICH BENEFITS THE VICTIMS OF PRIOR DISCRIMINATORY PRACTICES FOLLOWING FINDINGS BY THE COURT OF A LONG HISTORY OF DISCRIMINATION.

The Government argues that certiorari should be granted in this case because the lower courts have consistently rejected the Government's efforts to interpret *Firefighters Union No. 1784 v. Stotts*, ____ U.S. ____, 104 S. Ct. 2576 (1984) (hereinafter "*Stotts*") expansively, far beyond the natural and inherent limitations of this Court's opinion. While eventually one or more lower courts may adopt at least a portion of the Government's argument, Respondent submits that the overwhelming uniformity of decisions by the Courts of Appeals is a reason to deny, rather than to grant, certiorari in this case.

A. Even If The Petitioner's And The Government's Interpretation Of Stotts Is Correct, Review Should Be Declined In This Case Because The Race-Conscious Relief Approved By The District Court Was Limited To "Victims" Of Discrimination.

The most dramatic race-conscious aspects of the City's affirmative action plan were fully implemented on February 7, 1983 when forty-three minority promotions were made pursuant to paragraph seven of the plan. All of the

beneficiaries of paragraph seven were "actual victims" of the discrimination previously practiced by the City of Cleveland. The additional race-conscious aspects of the plan are contained in paragraph thirteen. [Pet. App., p. A46.] This paragraph requires a small number of additional minority promotions, as needed, to further remedy the prior discrimination in promotions practiced by the City.

Significantly, the beneficiaries of paragraph thirteen have again been selected from among those "actual victims" of discrimination who were minority employees of the Division of Fire as of January 31, 1983. This connection is clear when one considers the 1987 termination date of the race-conscious aspects of the plan (actually the *de facto* termination date is likely to be early in 1986); the time required for any new minority firefighters to apply for admission to the Division of Fire, complete their fire academy training and become formally accepted into the Fire Division; the three years necessary to become eligible to compete for promotion [Pet. App., p. A33, paragraph 5]; and the slight advantage afforded senior fire division members in competing for promotions by reason of the seniority credit. [*Id.*] All of these factors were considered by the parties when negotiating the race-conscious aspects of the affirmative action plan and the plan implicitly recognizes these factors. Thus, even if *Stotts* is read expansively, the judgment of the Court of Appeals must be affirmed. Therefore this Court is urged to consider this additional factor in exercising its discretion to decline review in this case.

B. Regardless Of Whether The Relief Afforded By The Affirmative Action Plan Was Tailored To "Actual Victims", Stotts May Not Reasonably Be Extended To The Facts Of This Case.

Even if it is necessary and appropriate to reach the questions presented for review by the Petitioner and the Government which involve the meaning of §706(g) in light of *Stotts*, there are several persuasive reasons why the expansive interpretation urged by Petitioner and the Government should not be considered as a basis upon which this Court should grant review. First, as at least seven of the Courts of Appeals have held, the "actual victims" language of *Stotts* is limited to relief which impacts upon a bona *fide* seniority system because of the critical presence in *Stotts* of an issue under §703(h) of Title VII. *See*, cases cited by the Government at p. 10, Brief for the United States as Amicus Curiae. Second, *Stotts* preserves the well recognized distinction between make-whole relief as limited by §706(g) and affirmative action relief which does not require the hiring, promotion or reinstatement of any particular individual. *See* 104 S. Ct at 2589; *EEOC v. Local* 638, 753 F.2d 1172, 1186 (2nd Cir. 1985), *cert. pending* (No. 84-1656). *See also* 104 S. Ct. at 2606 (Blackmun, *J.*). Finally, at most, the plain language of §706(g) speaks solely to limitations on the power of a court to compel an employer to engage in race-conscious relief.[18] By contrast, §706(g) does not limit District Court approval of that which an employer chooses to do vol-

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18. The reference to "the court" in that language of §706(g) which begins with the phrase "[n]o order of the court shall" clearly refers back to the earlier enumeration in the same section of that which "the court" may compel following a trial on the merits.

untarily.[20] *See*, cases cited by the Government at p. 10, Brief for the United States as Amicus Curiae. *See also*, *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

CONCLUSION

For all the foregoing reasons, Respondent Vanguards of Cleveland respectfully requests that this Court deny the request for review sought by Petitioner in this case.

Respectfully submitted,

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20. Prior decisions of this Court do not preclude a consent decree from containing relief which exceeds that which may be ordered following a trial on the merits where as here, the relief is consistent with the broad substantive policy of the statute as reflected in *United Steelworkers of America v. Weber*, 443 U.S. 193, 204 (1979) and *W. R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 770 (1980). *See System Federation No. 91 v. Wright*, 364 U.S. 642 (1961).

APPENDIX

UNITED STATES CONSTITUTION

Amendment XIV, §1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

UNITED STATES CODE

Title 42

42 U.S.C. §1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to

be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

LETTER, MARCH 22, 1985, JOHN D. MADDOX TO WM. BRADFORD REYNOLDS

CITY OF CLEVELAND
GEORGE V. VOINOVICH, MAYOR
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JOHN D. MADDOX
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March 22, 1985

Wm. Bradford Reynolds, Esq.
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United States Department of Justice
Washington, D.C. 20530

Re: Vanguards of Cleveland, et al.
v. City of Cleveland, et al.
Sixth Circuit Court of Appeals
Case No. 83-3091

Gentlemen/Madam:

This is with reference to the Memorandum of the United States as Amicus Curiae in Support of Appellant's Suggestion of Rehearing En Banc, which was served in the above action on March 14, 1985.

At pages 2 and 7 (n.3) of the above Memorandum, it is stated that the intervenor Union entered into a collective bargaining agreement with the City of Cleveland (the "City") which included certain provisions with respect to promotions within the City's Division of Fire, and that the Consent Decree entered in this action abrogated promotion rights guaranteed by such an agreement. The Memorandum refers to pages 12 and 20 of the Slip Opinion of the panel as authority for those statements.

The above statements are in error. The Union's Complaint in this action, which was filed on July 7, 1981, included no allegation concerning any collective bargaining agreement, nor was any such agreement ever proffered into evidence. The City's appellate brief argued that the Union lacked standing to prosecute its appeal from the entry of the Consent Decree on the basis, inter alia, of the fact that "none of its [i.e., the Consent Decree's] provisions are shown by the record in this case to impact any contractual relationship between Local 93 and the City." (City Brief, page 6.) *See also* page 8 of the City's Brief, pointing out that "Local 93 has neither alleged nor shown that any part of the Amended Consent Decree violates any collective bargaining agreement between it and the City."

The Union made no attempt to controvert the foregoing statements of fact, and nothing in either the majority or dissenting opinions of the panel of the Court of Appeals supports the statements contained in the Memorandum of the United States that the record reflects the existence of a collective bargaining agreement between the City

and the Union and that the Consent Decree abrogated such an agreement.

Very truly yours,

JOHN D. MADDOX
Director of Law
By: /s/ DALE F. KAINSKI
DALE F. KAINSKI
Chief Counsel
and
/s/ IRVING BERGER
IRVING BERGER
Assistant Director of Law

/vvg
cc: Edward R. Stege, Jr., Esq.
William L. Summers, Esq.
Clerk of Courts, United States District Court
Court of Appeals, Sixth Circuit

AMICUS CURIAE

BRIEF

Office Supreme Court, U.S.
FILED
JUL 24 1985
CLERK

No. 84-1999

In the Supreme Court of the United States

OCTOBER TERM, 1985

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, C.L.C., PETITIONER

v.

CITY OF CLEVELAND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a consent judgment in an action brought under Title VII of the Civil Rights Act of 1964 against a public employer may award racial preferences in promotions to persons who are not the actual victims of the employer's discrimination.

2. Whether a consent judgment may be entered over the objection of an intervenor of right whose interests are adversely affected by the terms of the consent judgment.

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits, *inter alia*, racial discrimination in employment. The Attorney General is responsible for enforcement of Title VII where, as here, the employer is a government, governmental agency, or political subdivision. 42 U.S.C. 2000e-5(f)(1). This Court's resolution of the issues presented in this case will accordingly have a substantial effect on the Attorney General's enforcement responsibilities. The federal government, which is the nation's largest employer, is also subject to the requirements of Title VII in that capacity. 42 U.S.C. 2000e-16.

In cases that present questions similar to the instant case and that are or shortly will be before this Court, federal agencies are involved as parties, in one case as the plaintiff that sought enforcement of Title VII against offending unions[1] and in the other as a defendant sued

[1] *Local 93 of the Sheet Metal Workers' International Association* v. *EEOC*, petition for cert. pending, No. 84-1656. In that case, the

for alleged employment discrimination.[2] We urge review in the present case because in our judgment the legal issues are posed here free from obscuring complexities.

STATEMENT

In 1980, the Vanguards of Cleveland (Vanguards), an association of black and Hispanic firefighters employed by the City of Cleveland, brought a class action in the United States District Court for the Northern District of Ohio, alleging that the Cleveland Fire Department had discriminated in promotions, in violation of the Thirteenth and Fourteenth Amendments, 42 U.S.C. 1981 and 1983, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The complaint charged the City with using unfair written tests and seniority points, manipulating retirement dates with respect to the dates on which promotion eligibility lists expired, and failing to hold promotional examinations since April 1975 (Pet. App. A2). The complaint also alleged that blacks and Hispanics were underrepresented in the ranks of lieutenant and above (*ibid.*). The complaint sought a declaratory judgment, an injunction prohibiting the continuation of discriminatory practices, and the institution of a hiring and promotion program for blacks and Hispanics (Pet. App. A2-A3).

Second Circuit gave this Court's decision in *Firefighters Local Union No. 1784 v. Stotts*, No. 82-206 (June 12, 1984), a narrow interpretation. The Commission will be filing a response asking that the petition in that case be held pending disposition of the present case. Neither the Commission nor the United States urges that the Court review the decision in that case because of its factual and procedural complexities, including the fact that the remedial issue is presented in the context of a contempt proceeding.

[2] In *Turner v. Orr*, 759 F.2d 817 (11th Cir. 1985), which involves a consent decree entered into by the Air Force, the government intends to file a petition for a writ of certiorari and to suggest that its petition be held pending disposition of the present case. We urge plenary review in the present case, rather than *Turner*, because *Turner* poses a potentially dispositive threshold question regarding the correct interpretation of the consent decree.

Shortly after the complaint was filed, the parties began negotiations. In 1981, petitioner (Local Number 93, International Association of Firefighters, the collective bargaining representative of all of the Cleveland firefighters) successfully moved for intervention of right under Fed. R. Civ. P. 24(a)(2). Petitioner alleged that "[p]romotions based upon any criteria other than competence, such as a racial quota system," would be discriminatory. Pet. App. A3.

In November 1982, the parties reached a tentative settlement, but this agreement was rejected by a vote of 88% of the membership of petitioner. The Vanguards and the city then negotiated a settlement to which petitioner strongly objected. The collective bargaining agreement between the city and petitioner, as well as the civil service rules, provided for promotions to be made primarily on the basis of test scores, with extra points granted for seniority. Under the proposed settlement, however, a preference was given to any "minority" (*i.e.*, black or Hispanic) firefighter who passed the promotional exams, regardless of whether he or she was the actual victim of discrimination. During the first stage of the decree, approximately 50% of all promotions were to go to minority candidates. The city was ordered to certify lists of those eligible for promotion based on the last exam and to make a large number of promotions no later than February 10, 1983. Pet. App. A33-A34. In making these promotions, the city was required to pair the highest ranking minority and non-minority candidates on the lists (*id.* at A34).[3] The second stage was to begin after certification of the eligible lists based on the next exam and was to continue until December 1987. The settlement set statistical "goals" to be achieved during this

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[3] If there were not enough eligible minority firefighters to fill the 33 lieutenant slots reserved for minority candidates, the unfilled slots were to be given to non-minorities. In that event, all future appointments to the rank of lieutenant from the next eligible list were to go to minority firefighters until the "shortfall" was made up. Pet. App. A34.

period for each rank and required that minority candidates be promoted "out of eligible list rank" if necessary to achieve these goals (Pet. App. A36).[4]

The district court entered this agreement as a "consent" judgment while expressly acknowledging that petitioner did not consent (Pet. App. A31). The court purported to retain exclusive jurisdiction over any attempt by petitioner or any other party to enforce, modify, amend, or terminate the decree (*id.* at A38). The court also provided that the decree was to supersede any conflicting provisions of state or local law (*id.* at A37).

Petitioner appealed, but a sharply divided panel of the Sixth Circuit affirmed (Pet. App. A1-A20), holding that "the district court did not abuse its discretion in finding that the consent decree was fair, reasonable and adequate" (*id.* at A10). In support of this conclusion, the court of appeals first noted that it had been conceded that there had been past discrimination by the fire department and that minorities were statistically underrepresented in the department's higher ranks (*ibid.*). The court also emphasized that non-minority firefighters would not be fired and were not *absolutely* barred from promotion (*id.* at A11). Finally, the court observed (*ibid.*) that the city was not required to promote unqualified minority firefighters, that the percentage "goals" were subject to modification under certain circumstances, and that the plan was scheduled to remain in effect for a limited period.

The court of appeals held (Pet. App. A12) that *Firefighters Local Union No. 1784* v. *Stotts*, No. 82-206 (June 12, 1984), had "no effect" on this case for two reasons: first, because here the decree did not totally abrogate the seniority system (Pet. App. A13) and, second, because the decree was a "consent" judgment rather

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[4] For the period following the 1984 exam, the goals were as follows: 20% for assistant chief; 10% for battalion chief; 10% for captain; 25% for lieutenant. Pet. App. A35.

For the period after the 1985 exam, the following goals were imposed: 10% for ranks above lieutenant and 25% for the rank of lieutenant. Pet. App. A35-A36.

than a judgment entered after adjudication of the suit (*id.* at A18-A20). The court likened this "consent" decree to a voluntary affirmative action plan such as that in *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979). Pet. App. A16-A17; see also *id.* at A9-A12.

Judge Kennedy dissented "because the language and reasoning of * * * *Stotts* indicate that the consent decree in the present case should be governed by the principles applicable to court-ordered relief rather than those applicable to purely voluntary actions" (Pet. App. A20-A21). She first explained (*id.* at A21) that under *Stotts* "if the present case had gone to trial and the plaintiffs had proven a pattern or practice of discrimination in promotions in violation of Title VII, the District Court could not have ordered relief equivalent to the provisions of the consent decree." *Stotts*, she wrote (Pet. App. A20), interpreted Section 706(g) of Title VII to mean that "when fashioning relief for a violation of Title VII a court [is] limited to making whole those found to have been victims of past discrimination."[5]

Having found that the quota relief at issue in this case could not have been awarded had the case gone to trial, Judge Kennedy concluded, in reliance on *Stotts* and *System Federation No. 91* v. *Wright*, 364 U.S. 642 (1961), that this relief could not be awarded in a consent decree. She noted that a consent decree is a court order and consequently has a legal stature far exceeding a mere contract (Pet. App. A26). She concluded (*id.* at A28):

> Under the Supreme Court's decision in *Stotts*, a court may not enter relief of the type embodied in the consent decree in this case. Since the power to enter a consent decree purporting to enforce a statute is drawn from that statute, it is incongruous to approve a consent decree that goes far beyond the scope of relief permissible under the statute.

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[5] Judge Kennedy also disputed (Pet. App. A21-A22) the panel majority's view that the present case does not involve an abrogation of seniority rights. She concluded that here, as in *Stotts*, "[t]he consent decree * * * in effect gives minority firefighters superseniority over all non-minority firefighters."

DISCUSSION

This case presents recurring and important questions regarding the type of relief permitted in Title VII suits, as well as the use of consent decrees in public law litigation and their enforcement against nonconsenting parties.

This is one of a series of recent lower court decisions upholding quota relief and giving this Court's decision in *Stotts* what we regard as an overly narrow interpretation. In the most recent of these cases, the First Circuit candidly acknowledged (*Devereaux* v. *Geary*, No. 84-2004 (June 24, 1985), slip op. 18): "[T]his is a difficult and sensitive area in which we and the other circuit courts could be mistaken in our reading of current precedent." However, the First Circuit declined to depart from pre-*Stotts* precedent "until the Supreme Court has shed more light in this area" (*ibid.*). Unless corrected, this growing body of lower court precedent will have a major continuing import, sanctioning both the continued implementation of old decrees and the entry of new judgments that may ultimately have to be overturned. We therefore submit that prompt review of the lower courts' interpretation of *Stotts* is warranted and needed.

The instant case is especially appropriate for review because it presents with particular clarity (see pages 1-2, notes 1, 2, *supra*) the two most commonly recurring grounds offered by the lower courts to justify the post-*Stotts* imposition of racial and ethnic quotas: (1) that this Court's decision in *Stotts* disapproved of quota relief only where it abrogates a bona fide seniority system protected under Section 703(h) of Title VII, 42 U.S.C. 2000e-2(h), and (2) that in any event relief awarded in a consent decree need not conform to statutory restrictions governing relief in litigated cases. This latter proposition is of importance in many areas of the law besides Title VII and concerns a question that is a source of considerable confusion and disagreement among the courts of appeals.

The need for closer judicial scrutiny of so-called "consensual" relief is highlighted in the present case because

here the "consent" decree was imposed over the strenuous objection of a union intervenor whose members are seriously and adversely affected by the terms of the decree. The lower court precedent sanctioning the entry of "consent" decrees over the objection of an intervening union is a harsh complement to the companion doctrine that a union and non-minority employees who do not intervene in an employment discrimination case are barred from "collaterally" challenging the decree in any subsequent proceeding. *Ashley* v. *City of Jackson*, No. 82-1299 (Oct. 11, 1983) (Rehnquist and Brennan, JJ., dissenting from the denial of certiorari).

1. The unambiguous meaning of *Stotts*, in our view, is that a court in a Title VII suit may not award affirmative equitable relief to non-victims at the expense of innocent third parties. In *Stotts*, the district court modified a Title VII consent decree over the objection of the employer, the City of Memphis. This modification prohibited the City from following its seniority system in determining who must be laid off insofar as application of that system would decrease the proportion of black employees. As a result, some "non-minority employees with more seniority than minority employees were laid off or demoted in rank" (*Stotts*, slip op. 4). This Court reversed. After first holding (*id.* at 10-12) that the modification went beyond merely enforcing the agreement of the parties as reflected in the consent decree, the Court then concluded (*id.* at 12-20) that the layoff quota was a type of relief "that could not have been ordered had the case gone to trial and the plaintiffs proved that a pattern or practice of discrimination existed" (*id.* at 16). Relying on *Teamsters* v. *United States*, 431 U.S. 324 (1977), and *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), the Court held that it was improper under Section 706(g) of Title VII for the court to award protection against lay-offs because of mere membership in the disadvantaged class (*Stotts*, slip op. 15-20).*

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*Section 706(g) provides, in pertinent part: "No order of the court shall require * * * the hiring, reinstatement, or promotion

The Court expressly reaffirmed its rulings in *Franks* and *Teamsters* that the policy underlying Section 706(g) "is to provide make-whole relief only to those who have been actual victims of illegal discrimination" (*Stotts*, slip op. 16-17). The Court discussed the legislative history of Section 706(g) at length and noted that during the legislative debates opponents of Title VII had charged that "if the bill were enacted, employers could be ordered to hire and promote persons in order to achieve a racially-balanced work force even though these persons had not been victims of illegal discrimination" (*Stotts*, slip op. 16-17) (footnote omitted)). As the Court observed (*id.* at 18), responses to these charges by supporters of the bill made "clear that a court was not authorized to give preferential treatment to non-victims" (*id.* at 18). The Court also cited repeated statements by the bill's supporters reflecting Congress's clear intent that *"Title VII does not permit the ordering of racial quotas * * *"* (*ibid.*, quoting 110 Cong. Rec. 6566 (1964) (emphasis added by Court)).[7]

Since *Stotts*, six courts of appeals have commented on the meaning of *Stotts*, and without exception they have given it a narrow interpretation. See Pet. App. A12-A20; *Devereaux*, slip op. 9-19; *Turner* v. *Orr*, 759 F.2d

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of an individual as an employee * * * if such individual * * * was refused employment or advancement * * * for any reason other than discrimination on account of race * * *." 42 U.S.C. 2000e-5(g).

[7] This congressional understanding regarding the remedial powers of courts in Title VII cases was perhaps most succinctly expressed in a bipartisan newsletter prepared by the principal Senate sponsors of the bill and distributed to supporters during an attempted filibuster. The newsletter stated "[u]nder Title VII, not even a court, much less the Commission, could order racial quotas or the hiring, reinstatement, admission to membership or payment of back pay for anyone who is not discriminated against in violation of this title" (*Stotts*, slip op. 18, quoting 110 Cong. Rec. 14483 (1964) (footnote omitted)). In addition to the portions of the legislative history cited in *Stotts*, see similar statements at 110 Cong. Rec. 1518, 5094, 6548, 7207 (1964).

817, 823-826 (11th Cir. 1985);[8] *EEOC* v. *Local 638*, 753 F.2d 1172, 1186 (2d Cir. 1985), petition for cert. pending, No. 84-1656;[8] *Diaz* v. *AT & T*, 752 F.2d 1356, 1360 n.5 (9th Cir. 1985); *Van Aken* v. *Young*, 750 F.2d 43, 45 (6th Cir. 1984); *Wygant* v. *Jackson Board of Education*, 746 F.2d 1152, 1157-1158 (6th Cir. 1984), cert. granted, No. 84-1340 (Apr. 15, 1985);[10] *Kromnick* v. *School District*, 739 F.2d 894, 911 (3d Cir. 1984), cert. denied, No. 84-606 (Jan. 7, 1985); *Green* v. *City of Madison*, 738 F.2d 795, 795 n.5 (7th Cir. 1984), cert. denied, No. 84-304 (Oct. 15, 1984).[11] As the First Circuit acknowledged may be the case (*Devereaux*, slip op. 18), we submit that the courts of appeals have indeed misapprehended the import of *Stotts* and that intervention by this Court is needed.

While the courts of appeals have found several grounds for distinguishing and limiting *Stotts*,[12] the two grounds upon which the court of appeals in this case relied are

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[8] See page 2, note 2, *supra*.

[9] See page 1, note 1, *supra*.

[10] *Wygant* is limited to claims under the Fourteenth Amendment and presents no Title VII issues. See U.S. Br. as Amicus Curiae at 2 & n.3, *Kromnick* v. *School District*, *supra*. However, if our position on the Equal Protection Clause issue raised in *Wygant* is correct, the relief awarded in the present case is unconstitutional. See especially U.S. Br. at 26-30. (We are serving copies of our brief in *Wygant* on the parties in this case.)

[11] Several of these decisions, while misinterpreting *Stotts* in other respects, correctly hold that *Stotts* did not address the validity vel non of provisions of a voluntary affirmative action plan not embodied in a consent decree. *Van Aken* v. *Young*, 750 F.2d at 45; *Kromnick* v. *School District*, 739 F.2d at 911; *Green* v. *City of Madison*, 738 F.2d at 795 n.5. As these courts recognized, the validity of such measures under Title VII is governed by *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979).

[12] In addition to the decisions limiting *Stotts* to contested cases involving seniority rights, there are decisions indicating that *Stotts* applies only when no statutory violation has been found or conceded (*Devereaux*, slip op. 14; *EEOC* v. *Local 638*, 753 F.2d at 1186), only when the relief adversely affects identifiable innocent third parties (*Turner* v. *Orr*, 759 F.2d at 824), and only when the relief is retrospective (*EEOC* v. *Local 638*, 753 F.2d at 1186).

employed most frequently. First, the court below held that *Stotts* does not apply to consent decrees. Pet. App. A13-A20; see also *Devereaux*, slip op. 14; *Turner* v. *Orr*, 759 F.2d at 824. We will discuss this question below (see pages 12-20, *infra*). In addition, six courts of appeals, including the Sixth Circuit in the present case have stated that *Stotts* applies only when seniority rights are abridged. Pet. App. A13; *Turner* v. *Orr*, 759 F.2d at 824; *EEOC* v. *Local 638*, 753 F.2d at 1196; *Diaz* v. *AT & T*, 752 F.2d at 1360 n.5 (dicta); *Van Aken* v. *Young*, 750 F.2d 43, 45 (6th Cir. 1984) (dicta); *Kromnick* v. *School District*, 739 F.2d at 911 (dicta); *Green* v. *City of Madison*, 739 F.2d at 795 n.5 (dicta). As Judge Kennedy noted in dissent below, seniority rights were infringed in the present case (Pet. App. A22), and in any event this basis for distinguishing *Stotts* is legally unsound.

The pivotal issue in *Stotts* was the type of relief that a court may award in a Title VII suit. Section 706(g), which broadly governs *all relief* in Title VII cases and is not limited to relief affecting seniority rights, speaks directly to this question.[9] As the Court stated in *Stotts*, Section 706(g) empowers federal courts in Title VII cases "to *provide* make-whole relief *only* to those who have been actual victims of illegal discrimination." *Stotts*, slip op. 16-17 (emphasis added).

In limiting *Stotts* to relief infringing seniority rights, the courts of appeals have pointed to *Stotts*'s discussion of Section 703(h), which provides that it is not unlawful for an employer to abide by a bona fide seniority system. See Pet. App. A14; *Turner* v. *Orr*, 759 F.2d at 824; *Kromnick* v. *School District*, 739 F.2d at 911. But as this Court expressly held in *Franks* (424 U.S. at 756), Section 703(h) merely "delineates which employment practices are illegal * * * and which are not"; it does not "prescribe relief otherwise appropriate under the remedial

[9] See page 7, note 6, *supra*.

provisions of Title VII, § 706(g), * * * where an illegal discriminatory act or practice is found."

Both the majority and dissenting opinions in *Stotts* reflect this understanding of the meaning of Sections 703(h) and 706(g). The majority discussed Section 703(h) in connection with the question whether the seniority system was bona fide (*Stotts*, slip op. 13-14), but the portion of the majority opinion devoted to the type of relief allowed under Title VII (*Stotts*, slip op. 14-20) repeatedly referred to Section 706(g) and made only one passing reference in a *footnote* to Section 703(h).[10] Similarly, the relevant portion of the dissenting opinion (*Stotts*, slip op. 19-29) extensively discussed Section 706(g), while making no reference to Section 703(h). And in principle a reading of *Stotts* limited to relief infringing seniority interests is not rational. Seniority rights are, to be sure, an important aspect of a worker's bundle of expectations regarding his job; but so are the expectations regarding promotion involved here. Those expectations are sacrificed under the promotion quota in this case no less than were seniority rights under the layoff quota at issue in *Stotts*; and in both cases these sacrifices were made to persons who have not themselves suffered discrimination by the defendant employer.[11]

[10] See *Stotts*, slip op. 20 n.17. The Court referred to "statutory policy * * * here, §§ 703(h) and 706(g) of Title VII."

[11] While the relevant portion of the majority opinion in *Stotts* did rely significantly on *Franks* and *Teamsters*—cases involving both Sections 706(g) and 703(h)—it seems clear that the majority was referring solely to the portions of those decisions concerning the remedial question governed by Section 706(g). In *Teamsters*, Part II of the opinion of the Court (431 U.S. at 334-356) discussed the legality of the conduct of the employer and the union, as well as the validity of the seniority system. It was in this portion of the opinion that Section 703(h) was discussed. Part III of the opinion (431 U.S. at 356-377), which discussed the remedial question, made no reference to Section 703(h), but instead made repeated references (431 U.S. at 359, 362, 364, 366, 372) to the sections of *Franks* concerning Section 706(g) (see 424 U.S. at 762-779). The *Stotts* majority cited only Part III of *Teamsters* (*Stotts*, slip op. 16, citing 431 U.S. at 367-371, 371-376).

2. a. The majority below also held that *Stotts* does not govern the present case because the order at issue here has been labeled a "consent" decree. For this reason, the court viewed the promotion quota as "voluntary," and held that Section 706(g)'s limitations on "coercive" remedial orders do not apply. Pet. App. A19-A20.

The majority's analysis is founded on a misconception of the nature of a consent decree. While a consent decree has some contractual attributes (*United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 236 n.10 (1975)), it nonetheless represents an invocation of the coercive power of a federal court," and it therefore has legal consequences far different from a mere contract. As Judge Kennedy explained in dissent below (Pet. App. A26), noncompliance with a consent decree is punishable by contempt, and the court retains jurisdiction to interpret and modify the decree. *See also SEC* v. *Randolph*, 736 F.2d 525, 528 (9th Cir. 1984). In addition, in the "consent" decree in this case, the employer agreed to alter the collective bargaining agreement without the union's consent, an act that would generally constitute an unfair labor practice under federal labor law. *W.R. Grace & Co.* v. *Rubber Workers*, 461 U.S. 757, 771 (1983). The "consent" decree at issue here also contains a provision superseding the constitution, statutes, and regulations of the State of Ohio, as well as all conflicting local laws (Pet. App. A37). Only a judgment whose force derives from federal law can have such preemptive effect.

Because a consent decree is a judicial act, it may not exceed the bounds of judicial authority. It has long been established, for example, that the court entering the

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[10] *Pope* v. *United States*, 323 U.S. 1, 12 (1944); *United States* v. *Swift & Co.*, 286 U.S. 106, 115 (1932); *cf. Carson* v. *American Brands, Inc.*, 450 U.S. 79, 83-84 (1981). As the Seventh Circuit recently recognized (*Donovan* v. *Robbins*, 752 F.2d 1170, 1176 (1985)), parties can always settle a case on their own terms by filing a stipulation of dismissal under Fed. R. Civ. P. 41(a)(1) because this disposition, unlike a consent decree, "will not affect (not demonstrably, anyway) third parties or involve the judge in carrying out the underlying settlement".

decree must have subject matter jurisdiction (*Swift & Co.* v. *United States*, 276 U.S. 311, 324 (1928)) and that any relief must be "within the general scope of the case made by the pleadings" (*Pacific R.R.* v. *Ketchum*, 101 U.S. 289, 297 (1879)). Similarly, in *System Federation No. 91* v. *Wright*, *supra*, this Court enunciated the simple but important principle that a consent decree may not award relief that exceeds statutory limitations and is "in conflict with statutory objectives" (364 U.S. at 651).

In *System Federation*, employees had brought suit some years earlier under a provision of the Railway Labor Act prohibiting discrimination by employers against nonunion employees, and the defendants—a railroad company and several unions—had agreed to a consent decree forbidding such discrimination. The statute subsequently was amended to permit union shops, and a union moved to modify the decree to reflect this amendment. The lower courts denied the motion, reasoning that since nonunion shops remained legal, the parties' agreement could be enforced.

This Court reversed, holding that failure to modify the decree "would be to render protection in no way authorized by the needs of safeguarding statutory rights" (364 U.S. at 648). The Court explained that the parties' agreement and consideration were not enough to sustain the decree because "it was the Railway Labor Act, and only incidentally the parties, that the District Court served in entering the consent decree now before us. * * * The parties have no power to require of the court continuing enforcement of rights the statute no longer gives" (*id.* at 651-652). The Court concluded (*id.* at 652-653): "The type of decree the parties bargained for is the same as the only type of decree a court can properly grant—one with all those strengths and infirmities of any litigated decree * * *. [T]he court was not acting to enforce a promise but to enforce a statute."

The *Stotts* decision reaffirmed this principle, stating (slip op. 13 n.9):

> "[T]he District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce," not from the parties' consent to the decree. *System Federation No. 91 v. Wright*, 364 U.S. 642, 651 (1961).

The Court made this statement in response to Justice Stevens's analysis that "[i]f the consent decree justified the District Court's preliminary injunction, then that injunction should be upheld irrespective of whether Title VII would authorize a similar injunction" (*Stotts*, slip op. 2 (Stevens, J., concurring)). The dissent made a similar suggestion (see slip op. 19-20 (Blackmun, J.)).[11]

The principle recognized in *System Federation* and reaffirmed in *Stotts* clearly means that a Title VII consent decree must conform to the policy of Section 706(g), which is "to provide make-whole relief *only* to those who have been actual victims of discrimination" (*Stotts*, slip op. 16-17 (emphasis added)). Providing relief to nonvictims not only goes beyond what the statute authorizes; such relief is contrary to what Section 706(g) expressly and unambiguously forbids. This is precisely what we understand this Court to have meant in *Stotts* when it stated that awarding preferences to non-victims would be "inconsistent with" Title VII (slip op. 13 n.9) and "counter to statutory policy" (*id.* at 20 n.17).

Judicial entry of a Title VII consent decree granting preferences to nonvictims is no different in principle from the entry of a consent decree contravening any other congressionally imposed limitation on statutory relief. For example, a provision of the Norris-LaGuardia Act, 29 U.S.C. 104, prohibits federal courts from issuing cer-

[11] In *Stotts*, both the three dissenting Justices and the one concurring Justice interpreted the majority opinion as saying that a consent decree cannot provide relief that would be unavailable after trial. See *Stotts*, slip op. 20 n.9 (Blackmun, J., dissenting) ("The Court's analysis seems to be premised on the view that a consent decree cannot provide relief that could not be obtained at trial."); *id.* at 2 n.3 (Stevens, J., concurring) ("The Court seems to suggest that a consent decree cannot authorize anything that would not constitute permissible relief under Title VII.").

tain injunctive relief in labor disputes. It seems clear that the parties to a lawsuit brought under the Norris-LaGuardia Act cannot by their consent grant to a federal court remedial power to issue an injunction exceeding the restrictions statutorily imposed by Congress.

Despite *System Federation*, the decisions of the courts of appeals evidence considerable confusion and disagreement regarding the question whether statutory restrictions on judicial relief apply to consent decrees. As previously noted, three court of appeals decisions, including that in the instant case, have held that Section 706(g)'s remedial limitations do not apply to consent decrees, and a similar approach has been taken by courts of appeals in other important contexts.[12] Other court of appeals decisions, however, are more faithful to the principle that consent decrees must honor statutory and other legal restrictions on the permissible scope of relief.[13] In view

[12] For example, the District of Columbia Circuit recently articulated the following murky formulation regarding the restrictions on relief awarded in consent decrees: "[T]he focus of the court's attention in assessing the agreement should be the purposes which the statute is intended to serve, rather than the interests of each party to the settlement." *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117, 1125 (1983), cert. denied, No. 83-1345 (May 29, 1984). See also *Seasons Committee by Cook v. Lynn*, 735 F.2d 1535, 1559 (3d Cir. 1984), cert. denied, No. 84-232 (Nov. 13, 1984). But see *Citizens for a Better Environment v. Gorsuch*, 718 F.2d at 1131 (Wilkey, J., dissenting) (A "court can only enter as a consent decree such relief as would have been within its jurisdictional power had the case gone to trial.").

[13] See *Washington v. Pennell*, 700 F.2d 571 (9th Cir. 1983) (consent decree inconsistent with Eleventh Amendment unenforceable); *Gomes v. Moran*, 605 F.2d 27 (1st Cir. 1979) (consent decree regarding prisoner transfers modified so as not to exceed due process requirements and so as to preserve state's ability to respond to emergencies); *Theriault v. Smith*, 523 F.2d 601 (1st Cir. 1975) (consent decree correctly modified because it granted AFDC benefits not authorized by statute as construed by this Court). Cf. *Roberts v. St. Regis Paper Co.*, 653 F.2d 164, 172-175 (5th Cir. 1981) (court of appeals does not reach question whether consent decree must be modified in order to conform to *Teamsters*, because validity of seniority system not yet litigated); *United States v.*

of this disagreement and the importance of consent decrees in a wide variety of cases, there is a substantial need for elucidation by this Court of the permissible scope of relief in a consent decree.

b. Title VII consent decrees should conform to the remedial policy of Section 706(g) because vital interests of innocent employees are at stake. It is one thing for consenting parties to enter into a consent decree affecting only their own rights. But a Title VII consent decree awarding preferences in hiring, promotions, seniority, or lay-offs to "minority" employees or prospective employees necessarily disadvantages those individuals who are not preferred. Neither the plaintiffs who sought such relief nor the employer who acceded to it can be counted on to protect the interests of the individuals who are disadvantaged by the decree. The employer may be all too willing to sacrifice the rights and interests of some employees or prospective employees in order to settle burdensome and costly litigation. Indeed, the employer may find it advantageous to barter away the rights of some present or prospective employees in exchange for relinquishment by the plaintiffs of their monetary claims. In addition, a public employer responsible to an electorate in which "minorities" predominate may have a strong incentive to enter into a consent decree awarding preferential treatment to "minority" group members. If the relief available in a Title VII consent judgment is not subject to statutory limitations and if the courts do not police those limitations, the legitimate rights and interests of employees who do not belong to the favored groups will frequently be sacrificed.

In a related context, this Court has emphasized that an employer may not unilaterally bargain away in a Title VII conciliation agreement the employment opportunities of its nonminority employees, particularly where, as here, those opportunities have been contractually protected in

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Georgia Power Co., 634 F.2d 929 (5th Cir. 1981) (*Teamsters* did not warrant modification of consent decree where seniority system not bona fide).

a collective bargaining agreement. In *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. at 771, the Court stated:

> [A]lthough the Company and the Commission agreed to nullify the collective-bargaining agreement's seniority provisions, the conciliation process did not include the Union. Absent a judicial determination, the Commission, not to mention the Company, cannot alter the collective bargaining agreement without the Union's consent.

See also, *Stotts*, slip op. 6 n.3 (O'Connor, J., concurring) ("[I]f innocent employees are to be required to make any sacrifices in the final consent decree, they must be represented and have had full participation rights in the negotiation process.").

In the present case, the abridgement of the rights of non-minority employees is particularly striking, for here the union representing all of the employees intervened of right, thereby agreeing to be bound by the court's judgment, and strenuously objected to the entry of the consent decree. Nevertheless, the court entered the decree. The court did not adjudicate the lawfulness of the provisions of the decree abrogating portions of the union's collective bargaining agreement and significantly disadvantaging its non-minority members. The court issued no findings of fact or conclusions of law. None of the procedures generally required by due process were followed. All of this was dispensed with because the judgment was labeled a "consent" decree. But this label is a misnomer because those who must bear the brunt of the decree, the union and the non-minority employees, did not consent.

The court of appeals' decision sanctioning this procedure is squarely in conflict with a string of employment discrimination decisions handed down by the Fifth Circuit. In *Wheeler* v. *American Home Products Corp.*, 582 F.2d 891, 896 (1977), the Fifth Circuit held that it was improper for the district court to dismiss a Title VII suit with prejudice as part of a settlement agreement to which intervening employees objected. Likewise, in *High* v. *Braniff Airways, Inc.*, 592 F.2d 1330 (5th Cir. 1979),

the court of appeals reversed a portion of a consent decree in an employment discrimination case that was entered over the union's objection. After concluding that the union had not consented (*see id.* at 1334), the court held that the disputed provision could not be sustained as a nonconsensual judgment because, contrary to *Trans-Stevo* and *Franks*, there was no showing that those benefitted were "being accorded a 'rightful place' on the basis of any individual merit or any discrimination peculiar to them as individuals" (992 F.2d at 1335).

Similarly, in *EEOC* v. *Safeways Stores, Inc.*, 714 F.2d 567, 576-580 (5th Cir. 1983), cert. denied, No. 83-1257 (May 21, 1984), the court held that a provision of a Title VII conciliation agreement calling for the retroactive award of seniority violated the collective bargaining agreement and could not properly be enforced unless the union consented or the merits of its claims were properly adjudicated.[20]

The elementary principle recognized in these cases is now increasingly ignored by other circuits in employment discrimination cases. *See, e.g., Kirkland* v. *New York State Department of Correctional Services*, 711 F.2d 1117, 1126 (2d Cir. 1983); *Stotts* v. *Memphis Fire Dept.* (*Stotts II*), 679 F.2d 579, 584 n.3 (6th Cir. 1982); *Stotts*

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[20] The decision in the present case is also inconsistent with *United States* v. *City of Miami*, 664 F.2d 435 (5th Cir. 1981). In that case, the en banc Fifth Circuit held that a consent decree binding upon a defendant union in an employment discrimination suit could be entered over the union's objection only "[u]nless an affected decree does not affect the nonconsenting party and its members" (*id.* at 442). The court concluded (*id.* at 440-447) that the union was affected by the decree to the extent that provisions of the contract were altered. Eleven of the 24 judges would have held that the union was not bound in any way by the judgment, since the union had not consented and the case had not been properly adjudicated (*id.* at 449-455 (*Gee, J., dissenting*)).

In the present case, the "consent" judgment altered the criteria for promotion in the collective bargaining agreement (*see* page 8, *supra*) and thus, under *City of Miami*, could not be entered over the union's objection. *See also Newman* v. *Graddick*, 740 F.2d 1513, 1519 (11th Cir. 1984).

v. *Memphis Fire Dept.* (*Stotts I*), 679 F.2d 541, 554 (6th Cir. 1982), rev'd on other grounds, No. 82-206 (June 12, 1984); *Dawson* v. *Pastrick*, 600 F.2d 70, 74-76 (7th Cir. 1979); *Airline Stewards* v. *American Airlines, Inc.*, 573 F.2d 960, 964 (7th Cir. 1978); *see also United States* v. *City of Miami*, 664 F.2d 435, 461-462 (5th Cir. 1981) (*Johnson, J., concurring and dissenting in part, joined by six other judges*). However, no valid justification for this procedure has been offered.

It has been stated that an objecting union or nonminority employee may not resist entry of a consent decree if the court concludes (albeit without following the procedures that would be required before entering judgment in a contested case) that the decree does not unlawfully affect the intervenor's rights. *See Kirkland*, 711 F.2d at 1126; *United States* v. *City of Miami*, 664 F.2d at 462 (*Johnson, J., concurring and dissenting in part*); *Stotts II*, 679 F.2d at 584 n.3. This argument begs the question. It justifies the failure to adjudicate the lawfulness of the relief awarded in the decree by assuming at the outset that the relief is lawful. *See United States* v. *City of Miami*, 664 F.2d at 452 (*Gee, J., concurring and dissenting in part, joined by 10 other judges*).

A second argument advanced to support nonconsensual "consent" decrees is that a rule enabling the union or nonminority employees to veto a proposed consent decree would hamper efforts to settle Title VII cases. *Kirkland* v. *New York State Department of Correctional Services*, 711 F.2d at 1126; *Dawson* v. *Pastrick*, 600 F.2d at 75-76; *Airline Stewards*, 573 F.2d at 963-964. But the policy favoring voluntary settlement does not justify "ramming a settlement between two consenting parties down the throat of a third and protesting one."[21] *United*

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[21] In *Stotts*, Justice O'Connor outlined the procedure that should be followed when Title VII plaintiffs wish to explore the possibility of a settlement that may adversely affect the rights of a union and its members. Justice O'Connor wrote (slip op. 6 (concurring) (footnote omitted)): "[I]n negotiating the consent decree, re-

Stotts v. *City of Memphis*, 664 F.2d at 451 (Gee, J., concurring and dissenting in part); *see Stotts*, slip op. 7 n.4 (O'Connor, J., concurring).

Finally, it has been suggested that unions and employees who object to a proposed Title VII "consent" decree are not due anything more than an opportunity to voice their objections before the decree is entered. *See, e.g., Kirkland*, 711 F.2d at 1126; *Airline Stewards*, 573 F.2d at 964. This argument amounts to the contention that due process is satisfied if a party is given a right of allocution before judgment is pronounced.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1985

[illegible] could have sought the participation of the union [and] negotiated the identities of the specific victims with the union and employer * * *." Neither of these prerequisites—meaningful participation by the union or the development of victim-specific relief—was satisfied in this case. Quite to the contrary, a "consent" decree awarding preferences to non-victims was approved by a federal district court and upheld by a court of appeals over the objection of the party most directly disadvantaged.

* * * [illegible]

JOINT

APPENDIX

Supreme Court, U.S.
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No. 84-1999

In The

Supreme Court of the United States

October Term, 1984

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, C.L.C.,

Petitioner,

vs.

CITY OF CLEVELAND, *et al.*,
and
VANGUARDS OF CLEVELAND,

Respondents.

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Petition for Writ of Certiorari To the United States Court of Appeals For the Sixth Circuit

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES FROM DISTRICT COURT

(COURT OF APPEALS NOT INCLUDED)

DATE	NO.	PROCEEDINGS
10/23/80	1	COMPLAINT filed.
12/ 8/80	3	ANSWER of defts to the Complaint filed. c/m 12/8/80.
4/27/81	7	MOTION of James Andrews for leave to intervene, with memorandum in support filed, copies mailed 4/27/81.
6/ 5/81	11	ORDER granting motion of Local 93 to intervene & pltf's motion to strike is overruled & denied. Local 93 shall submit its complaint in intervention with the Court within 30 days, filed. Lambros, J. Copies issued 6/5/81. (6/11/81)
7/ 7/81	12	COMPLAINT of applicant for intervention pltfs, filed. c/m 7/7/81.
11/10/81	13	MINUTES of PRE-TRIAL PROCEEDINGS filed. Lambros, J.r,—. (Discussion on proposed consent decree; parties (pltf, defts & intervenor) agree to discuss the proposed decree in preparation for next pre-trial on 11/17/81 at 2:00 p.m.)
11/20/81	15	ORDER that the promotion examinations shall be administered on 11/21/81 as scheduled & said examinations shall not be scored or graded; The answer sheets are to be collected at the examination place by a U.S. Marshal who shall deliver said answer sheets forthwith to the custody of this Court provided that this order shall not preclude the customary review of examination questions pur. to Rule 4.50 of the Civil Service Rules of City of Cleve-

land: Notice shall be issued on or before 12/1/81 to all putative class members advising them that written objections shall be filed on or before 12/15/81 & that final evidentiary hearing shall be held on 1/7/82 at 10:00 a.m.; A final evidentiary hearing on Intervenor's objections to be proposed consent order submitted by the pltfs & that defts shall be held on 1/7/81 at 10:00 a.m., filed. Lambros, J. c/m 11/20/81. (11/23/81)

11/30/81 20 ORDER directing the deft City of Cleveland to notify forthwith each & every black & every Hispanic firefighter presently employed by the City of Cleveland, of the terms of the proposed settlement by causing to be delivered to said persons the notice attached to this order identified as Exhibit A, filed. Lambros, J. (Exhibits Attached) c/m 11/30/81. (12/1/81)

1/07/82 34 MINUTES OF PRE-HEARING PROCEEDINGS filed. Lambros, J. r, Pavolino. (Minutes of Pre-Hearing conference held regarding order of presentation of evidence, anticipated time necessary to present evidence, etc. (not on the record): Stipulations entered on the record; Hearing begun: opening statements of all parties; began examination of R. Turner).

1/08/82 35 MINUTES OF PROCEEDINGS filed. Lambros, J. r, Pavolino. (Second day of hearing on proposed consent decree; proceedings continued until 10:00 a.m. on 1/21/82).

1/21/82 36 MINUTES OF PRE-TRIAL PROCEEDINGS filed. Lambros, J. r,—(Matters considered for intervenors: Brucato; Intervenors are to review the proposed con-

sent degree and determine their specific objections, if any, and present any suggestions for alternatives: Negotiations are to determine whether matter can be resolved without objection hearing, if not, issues for objections hearing are to be specifically defined as a result of the discussions; General discussions hearing tentatively set for 2/24/82 at 10:00 a.m.).

4/27/82 38 MINUTES of PROCEEDINGS, filed Lambros, J. r, Susan Manning. ((1) Hearing on proposed consent decree resumed; (2) testimony concluded; (3) Closing Arguments on Wed. 4/28/82 at 1:30 p.m.).

1/11/83 46 MOTION of Pltf's, for an order to show cause providing notice to class members of the submission of an amended proposed consent decree to this Court by the Pltf's. and the Deft's.; and for an order directing all class members and the Intervenors to f (sic) their objection to the proposed amended consent decree by 1/25/83 and for an order directed all class members and the Intervenors to show cause why the decree should not be ruled upon without the necessity of any further oral submissions by any interested party, filed. c/m 1/11/83.

1/11/83 47 MOTION of Pltf's. for approval of Amended Consent Decree, filed. c/m 1/11/83.

1/19/83 48 ORDER it appearing that Pltf's. motion for an order to show cause is well taken, it is hereby ordered as follows: (1) a copy of the Notice of Settlement, shall be delivered by the City of Cleveland forthwith to each & every Black & Hispanic firefighter presently employed by the City of Cleveland by interdepartmental mail, per-

sonal delivery, or ordinary mail, (2) all class members & Intervenor, International Association of Firefighters, Local 93 who object to the amended proposed consent decree shall file their objections in writing to this Court on or before 1/27/83, (3) All class members and Intervenors Local 93 who file objections to the amended proposed consent decree shall show cause in writing on or before 1/27/83 why this court should not make determination on the fairness, The Pltf's. and the Deft's. shall have seven (7) days to respond in writing to any submission received pursuant to paragraphs two through four or this order, filed. Lambros, J. Copies issued 1/19/83. (1/20/83)

1/26/83 49 OBJECTIONS by Intervenors, Local #93 of the International Association of Fire Fighters, A.F.L., C.I.O., C.L.C. to Consent Decree lodged with this court by Pltf's. & Deft's., filed. c/m 1/25/83.

1/27/83 50 ORDER that the second sentence on page 4 of the Notice to Class Members in the within action shall be changed to read: It provides that seniority points are to be used for promotions through 1987 but that jurisdiction in this Court is reserved to determine their use thereafter. The class shall be notified of this change in a manner consistent with paragraph 1 of this Court's order dated 1/19/83, filed. Lambros, J. Copies issued 1/27/83. (1/28/83)

1/31/83 52 AMENDED CONSENT ORDER by both Pltf's. & Deft's., filed. Lambros, J. Copies issued 1/31/83. (1/31/83)

1/31/83 53 MEMORANDUM OPINION & ORDER that the objection of Local 93 is hereby

overruled. Pltf's. motion to approve the proposed consent decree lodged on 1/11/83 is granted. The 1/11/83 proposed consent decree is hereby adopted as a fair, reasonable, and adequate resolution of the claims raised in this action. The Deft. City is ordered to implement the 1/11/83 consent decree forthwith. The Clerk of Court is hereby ordered to relegate to Jeffrey C. LeBarron, Assistant Director of Public Safety for the City of Cleveland, the reports of final raw score results and the answer sheets for each examination, which were placed in his custody under seal pursuant to the order of U.S. Magistrate David S. Perelman dated 9/30/82. This action is terminated, filed. Lambros, J. Copies issued 1/31/83. (1/31/83)

1/31/83 54 JUDGMENT in accordance with the memorandum opinion 7 order of this date, the 1/11/83 proposed consent decree is hereby adopted as a fair, reasonable, and adequate settlement of the claims in this action. The objection of Local 93 is hereby overruled.

2/ 7/83 56 NOTICE of appeal by Intervenor, filed. inre: 1/31/83. c/m Summers, c/m Stege, Jr., Wallach & USCA. (noted 2/8/83).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASERN DIVISION

CIVIL ACTION NO. C80-1964

THE VANGUARDS OF CLEVELAND,

Plaintiffs,

—vs—

THE CITY OF CLEVELAND; GEORGE V. VOINOVICH; VINCENT AMATO; WILLIAM E. BARRY; THE CIVIL SERVICE COMMISSION OF THE CITY OF CLEVELAND; THOMAS R. SKULINA; MARY R. BUBNA; EDWARD H. MASON; P. L. FENDERSON; and EDMUND J. TURK.

Defendants.

COMPLAINT: CLASS ACTION

(Filed October 23, 1980)

PRELIMINARY STATEMENT

1. This is a proceeding for a preliminary and permanent injunction enjoining Defendants from continuing to violate the rights of Plaintiffs and other similarly situated persons under the Constitution and laws of the United States by the maintenance of unlawful practices which have the purpose and/or effect of discriminating against them on the basis of their race and national origin. Such practices include, but are not limited to, discrimination by reason of race and national origin in the hiring, assignment and promotion of firefighters within the City of Cleveland Fire Department. This proceeding further seeks relief from Defendants' past violations of these rights and seeks a declaratory judgment that Defendants' practices violate the Constitution and laws of the United States.

JURISDICTION

2. This action is brought to enjoin violations by the Defendants of rights guaranteed by the Thirteenth and Fourteenth Amendments to the United States Constitution; 42 U.S.C. § 1981, providing for equal rights for all persons within the jurisdiction of the United States to make contracts; 42 U.S.C. § 1983, prohibiting deprivation under color of state law, regulation or municipal ordinance of rights, privileges and immunities secured by the Constitution and laws of the United States; 42 U.S.C. 2000d, prohibiting discrimination under any program or activity receiving federal financial assistance; and Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e, *et seq.* This is also an action for a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202.

PARTIES

PLAINTIFFS

3. Plaintiff The Vanguards of Cleveland is a membership association composed of the majority of the black and Hispanic firefighters presently employed by the Cleveland Fire Department. One of the primary goals of the organization is to encourage and work toward increased minority representation within all ranks and all subdivisions of the Cleveland Fire Department. The Vanguards is a member organization of the International Association of Black Profesisonal Firefighters.

4. This action is brought as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. This

action is brought on behalf of all black and Hispanic firemen presently employed by the City of Cleveland Fire Department, on behalf of all black and Hispanic applicants for positions with the Cleveland Fire Department, and on behalf of all blacks and Hispanics who in the future will apply for employment or will be employed as firemen by the Cleveland Fire Department. The class is so numerous that joinder of all members is impracticable. There are questions of law and fact common to the members of the class and such common questions clearly predominate over questions affecting only individual members of the class. The claims of the named plaintiffs are typical of the claims of the class. The plaintiffs will fairly and adequately represent and protect the interests of the class. The defendants have acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole. A class action is the only practial method for the fair and efficient adjudication of this controversy.

DEFENDANTS

5. Defendant City of Cleveland is a municipal corporation chartered under the laws of the State of Ohio with authority to sue and be sued.

6. Defendant George V. Voinovich is Mayor and Chief Executive Officer of the City of Cleveland, and as such is vested with the authority to appoint and remove city officials, including the Safety Director and Fire Chief, subject to state and local law. He is sued in his official capacity.

7. Defendant Vincent Amato is Acting Safety Director of the City of Cleveland in which capacity he is vested

with authority over the administration of the Safety forces of the City of Cleveland, including the Fire Department. He is sued in his official capacity.

8. Defendant William E. Barry is Fire Chief of the City of Cleveland, in which capacity he is vested with authority for the daily administration of the Cleveland Fire Department. He is sued in his official capacity.

9. Defendant Civil Service Commission of the City of Cleveland is a body politic created by the laws of the State of Ohio and the Charter and Ordinances of the City of Cleveland. It is vested with responsibility for administering the Civil Service system in the City of Cleveland in which capacity it prepares and administers entrance and promotional examinations for the Fire Department and performs related functions.

10. Defendants Thomas R. Skulina, Mary R. Bubna, Edward H. Mason, P. L. Fenderson and Edmund J. Turk are members of the Civil Service Commisison. Collectively they are responsible for developing policy for the Commission and performing certain review functions. They are sued in their official capacity.

11. All the individual defendants have been, are presently, or will be acting under color of authority and law of the State of Ohio and the City of Cleveland, Ohio. All of the individual defendants are engaged in and are responsible for administration, management, regulation, supervision and control of all or some parts of the Cleveland Fire Department. Said defendants are responsible for the creation, operation and enforcement of the regulations, policies, practices, customs and usages which discriminate because of race and national origin against plaintiffs in relation to employment with and promotion within the Fire Department.

STATEMENT OF FACTS

12. The City of Cleveland has for decades discriminated against blacks and Hispanics who have sought employment with the Cleveland Fire Department. The City refused to hire any minorities whatsoever until 1943. Since then, only a very small number of blacks and Hispanics have been able to secure employment with the Cleveland Fire Department. Indeed, today only 54 of 854 firefighters are black, a percentage of 6.3%. By contrast, the population of the City of Cleveland is over 40% black.

13. The low minoritay percentage in the Fire Department is not the result of chance but is the result of years of intentional discrimination through such devices as the discriminatory entrance examination, the selective application of physical and medical standards (scrupulously applied to minorities but commonly overlooked for whites), and the discriminatory use of the background check and other screening tools. While entrance requirements have improved in recent years under judicial scrutiny, the present effects of years of discrimination still haunt the minority citizens of Cleveland.

14. Those minorities who have managed to become employed by the Cleveland Fire Department have been historically accorded a status inferior to that of whites. Blacks and Hispanics have been restricted to certain areas of the City, more specifically the East Side, and have been denied an equal opportunity to obtain jobs with the specialized units within the department such as the fire prevention bureau and the fire alarm office. Minorities have been assigned to demeaning tasks and have been consistently excluded from the meal club and other benefits accorded white firemen.

15. Blacks and Hispanics have further been discriminated against by reason of their race and national origin in the awarding of promotions within the Fire Department. This discrimination has been effectuated by a series of practices, including but not limited to the following:

a. The use of written tests as a prerequisite for promotion which exclude a disproportionately high number of minority applicants for promotion, as opposed to white applicants;

b. The use, prior to 1975, of seniority points, said practice having the effect of reinforcing the impact of discriminatory hiring practices;

c. The manipulation of retirements *vis a vis* the date upon which each promotional eligibility list expires, so as to preclude minorities from being promoted; and

d. The failure of the City to give a promotion examination since April 29, 1975 thereby disproportionately disadvantaging the increased number of minorities who were hired in 1973.

Today only 10 of 248 men or 4.3% of those occupying the ranks of Lieutenant and higher are minorities. And of the 113 persons promoted to Lieutenant from the last promotion list, only 3 were minorities.

VIOLATIONS OF LAW

16. The actions and omissions of defendants, their agents and employees, alleged herein violate the rights of

blacks and Hispanics as secured by the Thirteenth and Fourteenth Amendments to the Constitution of the United States, 42 U.S.C. §§ 1981, 1983 and 42 U.S.C. §§ 2000d and 2000e, *et seq.*

NEED FOR RELIEF

17. Plaintiffs have no adequate remedy at law. Plaintiffs have suffered, are suffering, and will continue to suffer irreparable injury as a result of defendants' discriminatory practices alleged herein unless and until the relief demanded in this complaint is granted.

ADMINISTRATIVE PROCEEDINGS

18. The plaintiff has filed charges with the Equal Employment Opportunity Commission pursuant to Title VII of the 1964 Civil Rights Act.

RELIEF REQUESTED

WHEREFORE, Plaintiffs pray that this Court:

a. Issue a declaratory judgment that the employment and other practices and conditions set forth above are violative of rights secured by the Thirteenth and Fourteenth Amendments to the Constitution of the United States, 42 U.S.C. §§ 1981 and 1983 and 42 U.S.C. §§ 2000d and 2000e, *et seq.*

b. Issue a preliminary and permanent injunction:

(i) Prohibiting the defendants, their successors, agents and employees and those acting in concert with them from engaging in any of the practices set forth above or in any other practice shown to be discriminatory;

(ii) Prohibiting the defendants from using as conditions or other factors which are not professionally developed and properly validated and which disqualify or disadvantage a higher proportion of minority applicants for promotions than white applicants similarly situated;

(iii) Requiring that the defendants immediately award promotion to minority officers on the basis of valid, nondiscriminatory criteria;

(iv) Requiring the defendants to institute immediately an affirmative hiring and promotion program to eliminate the effects of past discriminatory practices.

c. Award such other and further relief as may be necessary and proper;

d. Allow the plaintiffs herein their costs and reasonable attorney's fees;

e. Award the plaintiffs and their class damages for the deprivation of their rights to be employed or promoted, including but not limited to wages lost by reason of the discriminatory acts herein alleged and measured from the dates of those discriminatory acts; and

f. After a prompt hearing of this action according to law, issue an order retaining jurisdiction of this claim

until such time as this court is assured from the activity of the defendants and their agents that the violation of rights complained of has ceased and is no longer threatened and that the effects of past violations have been remedied.

Respectfully submitted,

STEGE & DELBAUM

/s/ Edward R. Stege, Jr.
1614 Standard Building
Cleveland, Ohio 44113
(216) 861-0930

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO: C 80-1964

JUDGE LAMBROS

THE VANGUARDS OF CLEVELAND
and
CITY OF CLEVELAND
FIRE FIGHTERS, ASSOCIATION
Local #93 I.A.F.F., AFL-CIO,
CLC, James M. Andrews, President

Application for Intervention as Plaintiff

—vs—

CITY OF CLEVELAND, et. al.,

Defendants

MOTION FOR LEAVE TO INTERVENE AND MEMORANDUM IN SUPPORT

(Filed April 27, 1981)

Pursuant to Rule 24 of the Federal Rules Civil Procedure, Local #93, by and through its representative, James Andrews, moves to intervene in this action. Applicant moves to intervene on the basis of the following grounds:

1. Applicant's claim and interest in the subject of the action and they are so situated that the disposition of the action may impair or impede their ability to protect that interest; and existing parties do not adequately represent Applicant's interests.

2. Applicant's claim and the original action have a question of fact in common. A memorandum in support of this motion is attached hereto.

Respectfully submitted,

BLAISE A. BRUCATO
SUMMERS & POTTS
1040 Standard Building
Cleveland, Ohio 44113
(216) 696-0727

WILLIAM L. SUMMERS
SUMMERS & POTTS
1040 Standard Building
Cleveland, Ohio 44113
(216) 696-0727

Counsel for Applicant for
Intervention as Plaintiff

MEMORANDUM
STATEMENT OF THE CASE

Plaintiffs, The Vanguards of Cleveland filed a complaint in this action in October of 1980, stating the relief sought was a preliminary and permanent injunction enjoining the Defendant, City of Cleveland, from continuing to violate the rights of Plaintiffs and other similarity situated persons under the Constitution and laws of the United States by the maintenance of unlawful practices which have the purpose and/or affect of discriminating against them on the basis of their race, and national origin. Such practices are alleged to include discrimination by reason of race and national origin in the hiring, assignment and promotion of firefighters within the City of Cleveland Fire Department.

The Plaintiffs further sought relief from Defendants' past violations of these rights and sought a declaratory judgment that Defendants' practices violate the Constitution and laws of the United States.

Jurisdiction in the Federal Court was invoked under the Thirteenth (13th) and Fourteenth (14th) Amendments to the United States Constitution providing for equal rights for all persons within the jurisdiction of the United States and prohibiting deprivation under color of State law, regulation or municipal ordinance of rights, privileges and immunities secured by the constitution and laws of the United States and further prohibiting discrimination under any program or activity receiving Federal financial assistance.

Plaintiff, The Vanguards of Cleveland, is a membership association composed of a majority of the Black and

Hispanic Fire Fighters presently employed by the Cleveland Fire Department. Their primary goal being to encourage and work toward increased minority representation within all ranks and all subdivisions of the Cleveland Fire Department. The action was brought by said Plaintiff as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. The action being brought on behalf of all Black and Hispanic Firemen presently employed by the City of Cleveland Fire Department, and on behalf of Black and Hispanic applicants for position with the Cleveland Fire Department, and on behalf of all Black and Hispanics who in the future will apply for employment or will be employed as firemen by the Cleveland Fire Department.

The Defendants consist of the City of Cleveland, Mayor George V. Voinovich, Acting Safety Director, Vincent Amato, Fire Chief William E. Barry, the Civil Service Commission of the City of Cleveland and its individual members Thomas R. Skulina, Mary R. Bubna, Edward H. Mason, P. L. Fenderson, and Edmund J. Turk.

THE APPLICANT FOR INTERVENTION

The applicant for intervention is the President and authorized representative of the members of the International Association of FireFighters Local #93, all of whom are employees of the Cleveland Fire Department. The applicant is so situated that the disposition of this action may, as a practical matter, impair or impede his ability to protect an interest relating to the subject matter of the action. Each is, therefore, entitled, as a matter of right, to intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure. The applicant represents members of the

Cleveland Fire Department in all its various ranks, all of whom will be affected by any decision which may be rendered by this Court. The Union and its members wish to protect and promote the public's right to promotion based upon an eligible list which reflects results which demonstrate those who are currently most qualified for promotion. Should the promotion themselves be based upon the criteria called for in the Plaintiff's Complaint the integrity of the Cleveland Fire Department may be adversely affected and the ultimate safety of the citizen affected. Promotions should, and must, be based upon currently demonstrated competency. The minorities which Plaintiff, Vanguards of Cleveland, represents must be protected by unbiased and fair examinations, rather than any quota system which may be imposed upon the City and its Fire Department.

THE LAW

The Law which controls the application for the intervention in the instant case is setforth in Rule #24 (A) of the Federal Rules of Civil Procedure which provides as follows:

A. *Intervention of Right:*

Upon timely application, anyone shall be permitted to intervene in an action:

1. When a statute of the United States confers an unconditional right to intervene;

2. When the applicant claims an interest relating to the property or transaction which is the subject of the action he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicants interest is adequately represented by existing parities.

The Applicant for Intervention is entitled to intervene as a matter of right pursuant to the latter subsection of Rule 24(A).

Applicant for intervention "claims and interest relating to the property or transaction which is the subject of this action" and "are so situated that the disposition of the action may, as a practical matter, impair or impede their ability to proetect that interest." That interest is not "adequately represented by existing parties."

The relators in the pending action seek to require that the Defendant City immediately award promotions to minority officers only on the basis of non-discriminatory criteria, and require Defendant City to institute immediately an affirmative hiring and promotion program to eliminate the effect of past discriminatory practices. The Applicant for Intervention strongly opposes such relief in that it is their interest to maintain a well trained and properly staffed fire fighting force, and that promotions be made on the basis of demenstrative competency properly measured by competitive examinations administered in accordance with applicable provision of State, Federal and Local Laws. The applicant for intervention seeks to promote the public interest in having merit and competency rewarded by promotion in a manner which will assure the most efficient and effective operation of the Fire Department. This may best be accomplished by instituting a fair, impartial, and racially non-discriminatory promotional exam, and the parties who best complete such examination should be the parties entitled to promotion. The Defendant City also opposes the action instituted by the Plaintiff, Vanguards of Cleveland, but on grounds not entirely the same as the ones urged by the applicant for intervention. Neither Plaintiff, Vanguard of Cleveland, or Defendant City, therefore, can adequately represent the interests asserted by the applicant for intervention.

This Court is empowered to grant Applicant leave to intervene pursuant to Rule 24. The interests of the Applicant are not adequately represented by existing parties and yet the applicant members may be bound by any judgment this Court may render. Rule 24 should be liberally construed to prevent the occurance of such injustice. See, *United States -vs- C. M. Lane Lifeboat Company*, 25F. Supp. 410 (E.D.N.Y. 1939). Liberal construction of Rule 24 will assure the efficient use of judicial resources, by avoiding multiplicity of suits, mininizing contradictory results, saving time and expense, and relieving Court congestion. The applicant has a vital interest in guaranteeing that promotions are filled on a basis of competitive examinations, which are non-discriminatory. Applicant's interests is more than sufficient to warrant intervention. See, *Smart-vs- Coca-Cola Bottling Corporation*, 337 F. 2d 950 (6th Circuit 1964).

The Court must guarantee the residents of the City of Cleveland that the most qualified employees of the Fire Department will fill the vacancies which arise within department. As the representative of long-time employees of the fire department, Applicant would be able to add evidence and a prospective, not otherwise available to the Court, bearing upon the wisdom and legality of granting the relief sought by Plaintiffs. Applicant, therefore, is a worthy candidate for intervertion as of right. *Sertic -vs- Cuyahoga, Lake, Geauga and Ashtabula Counties Carpenters District Council*, 459 F. 2d 579, 581-83 (6th Circuit 1972).

Plaintiff, Vanguards of Cleveland, are not able to adequately represent Applicant. Plaintiffs basic relief may be highly detrimental to applicant and other fire department employees. They may very well demonstrate on the basis of newly administered competitive non-discriminatory examinations that they are entitled to such promotions. Only on the basis of such examinations should promotions be granted.

Respectfully submitted,

WILLIAM L. SUMMERS
Summers & Potts
1040 Standard Building
Cleveland, Ohio 44113

BLAISE A. BRUCATO
Summers & Potts
1040 Standard Building
Cleveland, Ohio 44113

Counsel for Applicant of
Intervention as Plaintiffs

CERTIFICATE OF SERVICE

A copy of the foregoing Motion for Leave to Intervene and Memorandum in Support, being sent by regular United States mail this — of April, 1981, to Counsel for the Plaintiffs, Edward R. Stege, Jr. 614 Standard Building, Cleveland, Ohio, 44113; and to Counsel for the Defendant, Thomas E. Wagner, Director of Law for the City of Cleveland, City Hall, Room 106, 601 Lakeside Avenue, Cleveland, Ohio, 44114.

WILLIAM L. SUMMERS

BLAISE A. BRUCATO

Counsel for Applicant of
Intervention as Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C 80-1964

THE VANGUARDS OF CLEVELAND,
and
CITY OF CLEVELAND
FIRE FIGHTERS, ASSOCIATION
LOCAL #93 I.A.F.F., AFL-CIO,
CLC, JAMES M. ANDREWS, President

Applicant for Intervention as Plaintiff

v.

CITY OF CLEVELAND, et al.,

Defendants

LAMBROS, DISTRICT JUDGE

ORDER
(Filed June 5, 1981)

Applicant, City of Cleveland Fire Fighters Association, Local 93 I.A.F.F., AFL-CIO, CLC (hereinafter Local 93) has moved to intervene as a party plaintiff in the above-captioned action as a matter of right under Rule 24(a)(2), F.R.C.P. Plaintiffs, The Vanguards of Cleveland, an association of minority fire fighters employed by the Cleveland Fire Department, have moved to strike the motion to intervene filed by Local 93 for failure to file a pleading under Rule 24(c), F.R.C.P. Plaintiffs contend that this Court should strike the motion to intervene without prejudice to the right of Local 93 to refile its motion accompanied by a pleading.

Upon consideration, Local 93's motion to intervene is granted and plaintiffs' motion to strike is overruled and denied. Local 93 shall submit its complaint in intervention with the Court within 30 days.

IT IS SO ORDERED.

/s/ Thomas D. Lambros
United States District Judge

DATED: June 5, 1981

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO: C 80-1964

JUDGE THOMAS LAMBROS
THE VANGUARDS OF CLEVELAND,
and
CITY OF CLEVELAND
FIRE FIGHTERS ASSOCIATION
LOCAL #93, I.A.F.F., AFL-CIO,
CLC, JAMES M. ANDREWS, President,

Applicant for Intervention as Plaintiff

-vs-

CITY OF CLEVELAND, et al.,

Defendants

COMPLAINT OF APPLICANT FOR INTERVENTION

(Filed July 7, 1981)

1. Plaintiffs, Vanguards of Cleveland, filed the original Complaint in October, 1980, charging the City of Cleveland with discrimination in the hiring, assignment and promotion of firefighters.

2. Plaintiff, Vanguards of Cleveland, is a membership association composed of the majority of the Blacks and Hispanic firefighters presently employed by the Cleveland Fire Department.

3. Defendants consist of the City of Cleveland, Mayor George V. Voinovich, Acting Safety Director Vincent Amato, Fire Chief William E. Barry, The Civil Service Commission of the City of Cleveland and its individual

member Thomas R. Skulina, Mary R. Bubna, Edward H. Mason, P. L. Fenderson, and Edmund J. Turk.

4. Plaintiff, City of Cleveland Fire Fighters Association, Local #93 I.A.F.F., AFL-CIO, CLC, by and through James Andrews, its President, has been granted leave to intervene as a party in this suit.

5. Local #93 is the representative of the members of the International Association of Fire Fighters Local #93 all of whom are employees of the Cleveland Fire Department, any and all of whom may be affected by any decision which may be rendered in the instant lawsuit.

6. Local #93 as the representative of its members must see that the public is assured that the fire department is efficient, well run, and employs the most capable individuals.

7. Promotions are to be given to reflect the individual most qualified to be raised through the ranks.

8. Promotional examinations within the Cleveland Fire Department are given on an irregular basis and do not arise frequently.

9. Promotions based upon any criteria other than competence, such as a racial quota system, would deny those most capable from their promotions and would deny the residents of the City of Cleveland from maintaining the best possible fire fighting force.

10. Plaintiff, Vanguards of Cleveland, seek to require the City to immediately award promotions to minority officers on the basis of non-discriminatory criteria, and to immediately institute an affirmative hiring and promotion program.

11. Local #93's interest is to maintain a well trained and properly staffed fire fighting force and contends that promotions should be made on the basis of demonstrated competency, properly measured by competitive examinations administered in accordance with the applicable provisions of Federal, State, and Local Laws.

12. Plaintiff, Vanguards of Cleveland, may be adequately protected by unbiased, fair, non-discriminatory examinations.

13. The residents of the City of Cleveland must be guaranteed that the most qualified employees of the Fire Department will fill the vacancies which arise within the department.

WHEREFORE, Intervenor prays that this Court:

a. Issue a preliminary and permanent injunction requiring the Defendant City to award promotions on the basis of demonstrative competency, properly measured by competitive examinations.

b. Dismiss the Plaintiff, Vanguards of Cleveland, Complaint.

c. Award such other relief as may be deemed necessary and proper.

d. Allow Intervenors herein reasonable Attorney's fees and other costs.

Respectfully submitted,

WILLIAM L. SUMMERS
Attorney for Intervenor as Plaintiff
1040 Standard Building
Cleveland, Ohio 44113

BLAISE A. BRUCATO
Attorney for Intervenor as Plaintiff
1040 Standard Building
Cleveland, Ohio 44113

SERVICE

A copy of the foregoing Complaint was served on Attorney for Plaintiff, Edward R. Stege, Jr. 614 Standard Building, Cleveland, Ohio; and Thomas Wagner, Director of Law for City of Cleveland City Hall, Room 106, 601 Lakeside Ave. Cleveland, Ohio 44114 on this — day of July, 1981.

WILLIAM L. SUMMERS
Attorney for Intervenor as Plaintiff

BLAISE A. BRUCATO
Attorney for Intervenor as Plaintiff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CIVIL ACTION NO. C 80-1964

JUDGE LAMBROS

THE VANGUARDS OF CLEVELAND,

Plaintiffs,

vs.

THE CITY OF CLEVELAND, et al.,

Defendants.

CONSENT DECREE

WHEREAS there has been a long history of discrimination against minority persons in the hiring practices and the promotion practices of the City of Cleveland Division of Fire;

WHEREAS prior litigation has confirmed the existence of the aforesaid history of discrimination but has failed to effectively eliminate the present effects of such discriminatory practices [see *Headen v. City of Cleveland*, United States District Court, Northern District of Ohio, Eastern Division, No. C73-330];

WHEREAS many of the practices used in the past to discriminate against minority applicants for promotion in the Cleveland Division of Fire were substantially similar to those used by the Cleveland Division of Police;

WHEREAS the Cleveland Division of Police is presently subject to an order issued following several years of litigation which governs the promotion practices of said Division [see *Shield Club v. City of Cleveland*, United

States District Court, Northern District of Ohio, Eastern Division, Nos. C72-1088, C77-346];

WHEREAS the parties are desirous of avoiding extended and costly litigation relating to the Cleveland Division of Fire;

WHEREAS discrimination which affects any segment of the population of the City of Cleveland is detrimental to the well-being and the interests of all the citizens of the City of Cleveland; and

WHEREAS the parties are desirous of effectuating a remedy which will eliminate all vestiges of discrimination in the promotion practices of the City of Cleveland Division of Fire.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

PRELIMINARY MATTERS

1. The plaintiffs have stated claims under the Thirteenth and Fourteenth Amendments to the United States Constitution; 42 U.S.C. § 1981; 42 U.S.C. § 1983; 42 U.S.C. § 2000d; and Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e, *et seq.* The jurisdiction of this Court is properly invoked under 28 U.S.C. §§ 1331, 1343(3) and (4) and 2000e, *et seq.*

2. The following definitions are adopted for purposes of this decree:

a. "Minority" persons shall mean black and Hispanic persons.

b. "Hispanic" refers to all persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race.

c. The "City" refers to the City of Cleveland, a party defendant herein.

d. "Firefighters" refers to all persons presently employed by the City of Cleveland Division of Fire and occupying the ranks of Fourth, Third, Second and First Grade Firefighter, Lieutenant, Captain, Battalion Chief, Assistant Chief and Chief and occupying said ranks or similar ranks in the Cleveland Division of Fire in the future. This definition shall include, but shall not be limited to, all probationary firefighters; it does not refer to the civilian employees of the Division of Fire.

e. "Defendants" refers to the named defendants in this litigation and their successors in office including the City of Cleveland.

3. This action is determined to be a class action pursuant to Rule 23(a) and (b) (2) of the Federal Rules of Civil Procedure. The class consists of all Black and Hispanic firefighters presently employed by the City of Cleveland, Division of Fire.

PROMOTIONS

4. The defendants shall utilize only such promotion criteria as are non-discriminatory and demonstrably job-related in compliance with Title VII of the 1964 Civil Rights Act and the Uniform Guidelines on Employee Selection Procedures, as hereafter amended. Such standards shall also be utilized in establishing the pass/fail level established for each promotion examination.

5. Seniority points shall not be used as a criteria for promotion. A firefighter shall be eligible to compete for promotion to Lieutenant after a period of five years from the date of his appointment as a firefighter and shall be eligible to compete for promotion to the next higher rank

after a period of one year from the date of his appointment as a Lieutenant, Captain, Battalion Chief or Assistant Chief, respectively.

6. No further promotions shall be made on the basis of the expired 1975 promotion eligible lists.

7. The defendants shall immediately administer new promotion examinations for the ranks of Lieutenant, Captain, Battalion Chief and Assistant Chief pursuant to the standards set forth in paragraph 4 of this order; eligible lists on the basis of said promotion examination shall be published no later than February 1, 1982.

8. The following interim procedures shall be implemented as a two-step temporary remedy designated to ameliorate the present effects of past discrimination in promotions while simultaneously minimizing any impact on the non-minority firefighters in the Cleveland Division of Fire:

a. Recognizing that, in the determination of the Mayor and Safety Director, there are substantial vacancies presently in existence in the ranks of Lieutenant and above and further recognizing that further vacancies are likely to occur prior to the preparation of new promotion eligible lists, the following minimum initial minority promotions shall be made from among those minority candidates who establish their qualifications by attaining a passing score on the promotion examinations referred to in paragraph 7:

(1) From among the first 40 persons promoted to the rank of Lieutenant, no less than 16 shall be minority;

(2) From among the first 20 persons promoted to the rank of Captain, no less than 3 shall be minority;

(3) From among the first 10 persons promoted to the rank of Battalion Chief, no less than 2 shall be minority; and

(4) From among the first 3 persons promoted to the rank of Assistant Chief, no less than 1 shall be minority.

Should more minority candidates qualify for promotion to the vacancies referred to in this paragraph by reason of their rank on the promotional eligibility lists than qualify by reason of the remedy specified in this paragraph, nothing herein shall be deemed to preclude the promotion of such additional minority candidates.

b. Following the implementation of the provisions of paragraph 8(a)(1), (2), (3) and (4), the defendants shall adopt the following additional interim procedures to take effect by rank as each individual subsection of paragraph 8(a) has been fully implemented:

(1) The defendants shall establish an appropriate minority promotion goal for the rank of Lieutenant in the Cleveland Division of Fire, said goal to be expressed in percentage form (the percentage of all Lieutenants employed by the City of Cleveland Division of Fire who are minority) and to be no less than 31.8%, a figure which is two-thirds (2/3's) of the 1980 United States Census figures for the percentage of minorities residing in the City of Cleveland. Similarly, the defendants shall establish appropriate minority promotion goals for the ranks of Captain and Battalion Chief in the Cleveland Division of Fire, said goals to be expressed in percentage form (the percentage of all Captains employed by the City of Cleveland Division of Fire who are minority; and the percentage of all Battalion Chiefs employed by the City of Cleveland Division of Fire who are minority) and to be no less than 28.1%, a figure which is three-fifths (3/5's) of the 1980 United States Census figures for the percentage of minorities residing in the City of Cleveland.

(2) The defendants shall establish appropriate timetables for the attainment of the aforementioned goal(s).

(3) Temporarily and until such time as at least 90-95% of the percentage goal(s) established under paragraph 8(b)(1) is attained or for a period of nine (9) years, whichever is less, the defendants shall promote no less than one minority firefighter to the rank of Lieutenant out of every three promotions to the rank of Lieutenant and shall promote no less than one minority firefighter to the ranks of Captain and Battalion Chief out of every four promotions to the ranks of Captain and Battalion Chief, all of such minority promotions to be made from among those firefighters who establish their qualifications by attaining a passing score on the promotion examination referred to in paragraph 7 and subsequent examinations. Should more minority candiates qualify for promotion by reason of their rank on the promotional eligibility

lists than qualify by reason of the remedy specified in this paragraph, nothing herein shall be deemed to preclude the promotion of such additional minority candidates.

(4) The nine year period in the preceding paragraph may be extended by mutual application of the parties signatory to this decree to this Court for an additional period not to exceed six (6) years if necessary to effectuate the purposes of this order.

(5) Eligible lists for each rank shall have a life of two years. Should the defendants exhaust the pool of qualified minority candidates from any given list and for any given rank, the defendants shall, at their discretion, exercise one of the following three options:

(1) suspend all further promotions pursuant to said given list(s) for the balance of the two year period;

(2) suspend all further promotions pursuant to said given list(s) and promptly administer new examinations and prepare new eligible lists; or (3) continue to use the eligible list(s) for the purposes of promotion without regard to the provisions of paragraph 8(b)(3). In the event that option three (3) is chosen, sub-paragraph eight (8) herein shall be waived; promotions may be made only in such numbers as shall not exceed those which are necessary to meet the manpower needs of the Cleveland Division of Fire; and promotions shall not be made in such numbers or in such a manner as to frustrate the goals and purposes of this decree. In the event that the defendants choose option three (3), such a choice shall not preclude the

defendants from thereafter selecting options one (1) or two (2) at any time during the balance of the two year period.

(6) In no event shall the defendants permit more than two and one-half years to elapse between the creation of an eligible list for any rank and the creation of a subsequent eligible list for any rank.

(7) The eligible lists shall not be extended beyond the two year period nor shall promotions be made beyond the two year period except upon application to this Court and under circumstances which will not frustrate or impede the goals and purposes of this decree.

(8) Notwithstanding the provisions of paragraphs 8(a) and 8(b)(3), all minority promotions to the ranks of Battalion Chief and Assistant Chief shall be made from among those minority persons who rank in the top sixty-seven (67%) percent of the eligible lists for said ranks. Minority promotions from the bottom thirty-three (33%) percent of these lists shall, however, be made in the event that non-minority promotions are made from the same portion of the lists.

OTHER MATTERS

9. Nothing herein shall preclude the plaintiffs and the defendants from jointly petitioning this Court for an amendment to the within decree increasing the rate(s) at which minority promotions are to be made hereunder. Such an amendment may be authorized upon a showing that (a) there are sufficient minorities in promotable

positions to make such an amended order reasonably feasible; (b) the goals and purposes of this decree will not be satisfied during the life of this decree; and (c) the goals and purposes of this decree will otherwise be served thereby.

10. The defendants shall supply plaintiffs' counsel with progress reports of compliance with each paragraph of the within order at intervals no less frequent than semi-annually. Such reports shall include the name and minority or non-minority status of all applicants for promotion.

11. This decree shall be severable and a subsequent determination of the invalidity of any one paragraph, subparagraph or portion thereof shall not affect the remaining provisions of this decree.

12. This decree shall be deemed controlling in the event of any conflict between this decree and the language of any state constitution, statute, charter provision, city ordinance or administrative rule. However: this decree shall be read in harmony with any state constitution, statute, charter provision, city ordinance or administrative rule if such a reading is possible and will not frustrate the purposes of this decree.

13. Defendants may continue to utilize the "one in three rule" prescribed by the City Charter of Cleveland to the extent that its use does not frustrate the purposes of this decree.

14. Defendants will not oppose an application by plaintiffs' counsel for reasonable attorney's fees in an amount not to exceed Four Thousand Eight Hundred Dollars ($4,800.00) which represents compensation for legal services performed through and including the date on which this decree was submitted to this Court for approval. This provision shall not be deemed to preclude consent to a supplemental application for attorney's fees should additional attorney's time be expended.

15. Defendants will bear the costs of this action.

Dated this — day of ———, 1981

United States District Judge

APPROVED:

Thomas E. Wagner
Director of Law,
City of Cleveland

/s/ Edward R. Stege, Jr.
Stege & Delbaum Co., L.P.A.
1614 Standard Building
Cleveland, Ohio 44113
(216) 861-0300
Attorney for Plaintiffs

By: Mark I. Wallach
Chief Trial Counsel
City Hall
Cleveland, Ohio
(216) 664-2772
Attorney for Defendants

No. C 80-1964

MINUTES OF PRE-TRIAL PROCEEDINGS
UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF OHIO, EASTERN DIV.
DATE 11-10-81 JUDGE THOMAS D. LAMBROS

REPORTER _____

VANGUARDS,

Plaintiff,

v.

CITY OF CLEVELAND,

Defendant.

(Filed November 10, 1981)

Attorney for Plaintiff STEGE

Attorney for Defendant _____

Intervenors: SUMMERS

MATTERS CONSIDERED:

Discussion on proposed consent decree.
Parties Plaintiff, Defendant & (Intervenor) agree to discuss the proposed decree in preparation for next P.T. on Tuesday, 11/17 @ 2:00 P.M.

/s/

DEPUTY CLERK

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CIVIL ACTION NO. C 80-1964

JUDGE LAMBROS

THE VANGUARDS OF CLEVELAND,

Plaintiffs,

vs.

THE CITY OF CLEVELAND, et al.,

Defendants.

ORDER
(Filed November 20, 1981)

WHEREAS the plaintiffs filed this action on October 23, 1980 complaining of race and national origin discrimination in the promotion of persons to the ranks of Lieutenant and above in the City of Cleveland, Division of Fire;

WHEREAS no promotion examinations have been administered by the City of Cleveland for the ranks of Lieutenant and above in the Division of Fire since 1975;

WHEREAS the plaintiffs and defendants have submitted to this Court for its approval a proposed consent order which will affect future promotions in the City of Cleveland, Division of Fire;

WHEREAS promotion examinations for the ranks of Lieutenant and above are presently scheduled for Saturday, November 21, 1981; and

WHEREAS all parties to this litigation, including the Intervenors, are agreed that it is in the interests of all parties concerned that said examinations be administered as scheduled and that promotions be made therefrom promptly thereafter;

NOW THEREFORE IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The aforesaid promotion examinations shall be administered on November 21, 1981 as scheduled.

2. Said examinations shall not be scored or graded.

3. The answer sheets for said examinations and such other documents as are necessary to preserve the confidentiality of the examination results shall be collected at the examination place by a United States Marshall who shall deliver said answer sheets forthwith to the custody of this Court where they shall be impounded pending further order of this Court; provided that this order shall not preclude the customary review of examination questions pursuant to Rule 4.50 of the Civil Service Rules, City of Cleveland.

4. Notice shall be issued on or before December 1, 1981 to all putative class members advising them that written objections shall be filed on or before December 15, 1981 and that a final evidentiary hearing shall be held on such objections on the 7th day of January, 1982 at 10:00 o'clock, A.M.

5. A final evidentiary hearing on Intervenor's objections to the proposed consent order submitted by the plaintiffs and the defendants shall be held on the 7th day of January, 1982 at 10:00 o'clock A.M.

UNITED STATES DISTRICT JUDGE

Dated this __ day of _____, 1981

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CIVIL ACTION NO. C 80-1964

JUDGE LAMBROS

THE VANGUARDS OF CLEVELAND,

Plaintiffs,

vs.

THE CITY OF CLEVELAND, et al.,

Defendants,

and

LOCAL 93, et al.,

Intervenors.

ORDER

(Filed November 20, 1981)

IT IS HEREBY ORDERED that defendant City of Cleveland notify forthwith each and every black and each and every Hispanic firefighter presently employed by the City of Cleveland, Division of Fire of the terms of the proposed settlement by causing to be delivered to said persons the notice attached hereto and identified as "Exhibit A". Delivery shall be by interdepartmental mail, personal delivery or ordinary mail.

UNITED STATES DISTRICT JUDGE

Dated this __ day of _____, 1981.

EXHIBIT A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CIVIL ACTION NO. C 80-1964

JUDGE LAMBROS

THE VANGUARDS OF CLEVELAND,

Plaintiffs,

vs.

THE CITY OF CLEVELAND, et al.,

Defendants,

and

LOCAL #93, et al.,

Intervenors.

NOTICE OF SETTLEMENT AND HEARING

TO: ALL MINORITY FIREFIGHTERS EMPLOYED BY THE CITY OF CLEVELAND DIVISION OF FIRE

Pursuant to an order of Judge Thomas D. Lambros of the United States District Court for the Northern District of Ohio, dated November 20, 1981, notice is hereby given that a hearing will be held in Room 117 of the United States Courthouse, Superior Avenue, N. E. at Public Square, Cleveland, Ohio at 10:00 a.m., January 7, 1982 (or at such adjourned time or times as the Court may, without further notice, direct). The purpose of the hearing is to determine whether a proposed settlement of the above-captioned action is fair, reasonable and adequate and should be approved by the Court and judgment entered thereon. The terms of the settlement are set forth in a proposed consent decree received by the Court on

November 5, 1981. The settlement has been agreed to by counsel for the Vanguards and counsel for the City of Cleveland.

This notice is directed to any individual who is a black or Hispanic firefighter presently employed by the City of Cleveland, Division of Fire.

DESCRIPTION OF THE ACTION

The complaint alleges that the City of Cleveland and various city officials have violated Title VII of the 1964 Civil Rights Act and certain other federal statutory and constitutional provisions by maintaining a system of hiring and promotions in the Division of Fire which discriminates against minority persons on the basis of race and national origin. Minorities are, for purposes of this lawsuit only, defined as black and Hispanic persons. The complaint seeks relief from these practices in the form of an injunction against future discrimination; an affirmative program of hiring and promotions which will compensate for prior deficiencies; damages including lost wages for those wrongfully discriminated against; and costs and attorney's fees.

Shortly after this lawsuit was begun, a series of negotiations was entered into between the attorney for the Vanguards and the attorney for the City in an effort to settle all aspects of this lawsuit relating to promotions. After approximately one year of discussions and negotiations an eight page consent decree was presented to this Court for approval. The Court has not indicated whether it will approve this consent decree and has scheduled a hearing on January 7, 1982 to consider the decree. This

notice should not be understood as an expression of opinion regarding the merits of the claims or defenses of any party to the lawsuit nor regarding the merits of the proposed settlement.

On June 5, 1981 the Court approved a request by Local # 93 of the International Association of Firefighters, AFL-CIO to intervene in this case. Shortly thereafter, Local # 93 filed a pleading which stated the Local's objections to any future system of promotions which would attempt to compensate for prior acts of discrimination by the use of racial preferences. Local # 93 has indicated that it objects to the proposed settlement and its objections will be heard at the hearing scheduled for January 7, 1982.

THE CLASS

As indicated previously, the persons whose rights are or may be affected by an order of the Court are any minority individuals who are presently employed as fire fighters, including promoted officers who are minority, by the City of Cleveland, Division of Fire. "Minority" in this context means black or Hispanic.

SETTLEMENT AGREEMENT

The proposed settlement agreement provides that the City may no longer use any criteria for promotion except those which are non-discriminatory and job related. It provides that seniority points are not to be used for promotions in the future and that no further promotions may be made off the 1975 eligible lists.

The proposed settlement creates an affirmative action program which will last for nine years, subject to an ex-

tension upon court approval for an additional six years. That affirmative action plan provides in essence as follows:

1. That an initial group of minority promotions shall be made such that from the next 40 promotions to Lieutenant, at least 16 shall be minority; from the next 20 promotions to Captain, at least 3 shall be minority; from the next 10 promotions to Battalion Chief, at least 2 shall be minority; and from the next 3 promotions to Assistant Chief, one shall be minority.

2. After this initial group of promotions, a ratio system will apply such that minorities will receive one out of every three promotions to the rank of Lieutenant and one out of every four promotions to the rank of Captain and Battalion Chief.

3. Minorities must establish their eligibility for such promotions by passing a job-related promotion examination and, in the case of Battalion Chief and higher, scoring in the upper two-thirds of those passing. If the list of qualified minorities is exhausted, the City has the option of promoting non-minorities to existing vacancies.

4. The formulas referred to above will only apply until such time as certain percentage goals are met in each of the upper ranks within the Division of Fire.

The proposed settlement does not provide for any monetary award of back pay or damages to the members of the class. The proposed settlement does indicate that the City will not oppose an application by plaintiffs' counsel to this Court for attorney's fees in the amount of $4,800.00.

Counsel for the Vanguards is Edward R. Stege, Jr. Mr. Stege is likewise counsel for the class of persons re-

ceiving this notice. Mr. Stege recommends that each member of class accept the proposed settlement as being in the best interests of all the members of the class.

THE SETTLEMENT HEARING

Any class member may appear at the aforementioned hearing on January 7, 1982 and show cause why the settlement agreement should not be approved as fair, reasonable and adequate; PROVIDED HOWEVER THAT NO CLASS MEMBER SHALL BE HEARD IN OPPOSITION TO THE SETTLEMENT AND NO PAPERS SUBMITTED BY ANY SUCH PERSON SHALL BE RECEIVED OR CONSIDERED BY THE COURT UNLESS SUCH PERSON SHALL FILE WITH THE CLERK OF THIS COURT ON OR BEFORE DECEMBER 15, 1981 A WRITTEN NOTICE OF SUCH PERSON'S INTENTION TO APPEAR AND OBJECT TO THE APPROVAL OF THE SETTLEMENT TOGETHER WITH COPIES OF ALL PAPERS AND BRIEFS TO BE SUBMITTED TO THE COURT AT SUCH HEARING. Any class member who does not timely file such written notice shall not receive notice of any further proceedings, hearings, orders or any other matters in connection with this action.

INSPECTION

For a more complete statement of the matters involved, reference may be made to the Court file of pleadings which is available for inspection 9:00-4:45 p.m., Mondays through Fridays, holidays excepted, at the office of the Clerk, United States District Court, Room 226, United

States Courthouse, Superior Avenue, N. E. at Public Square, Cleveland, Ohio.

UNITED STATES
DISTRICT JUDGE

Dated this — day of —, 1981.

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

COMMENCING 1/7/82

• • •

Direct Examination of Reginald M. Turner, Director of Public Safety

BY MR. STEGE:

(p. 84) • • •

Q Could you explain your answer for me?

A Yes. This decree will provide a representative number of fire officers, and by representative I mean reflecting the total community, and that influence, that presence, in light of the qualifications of all, will provide better leadership, better supervision, better management, better direction, better control of the fire effort.

Q Following up on that, have you had an opportunity to review the provisions of this decree insofar as they set certain qualification levels for persons, minorities and otherwise, to be promoted within the ranks of the Fire Department?

A Only in a general way, in a cursory way. I have not examined it in detail.

Q Have you had the opportunity to review the decree and ask yourself questions about the workability in practical terms of this particular decree?

A Oh, yes. Certainly.

Q Do you have an opinion on its workability?

A Yes. I think that it will work, as a matter of fact.

Cross-Examination of Reginald M. Turner

BY MR. BRUCATO:

• • •

(p. 89) Q I hate to back up, but you explained that this consent decree would certainly enhance the ranks of the Fire Department, and I will only ask you quickly to go over that again because I missed what you said there.

A I said that I felt the consent decree would enhance my ability and that of the Public Safety Department and Fire Division to deliver the quality of service that is expected of it to the citizens of Cleveland in general terms. That's what I said.

(p. 90) Q How do you feel it will enhance that service?

A I think the representative nature of the consent decree is, I believe, strongly directed toward providing citizens of Cleveland service from a group of fire fighters and officers that it desires, that the citizens themselves desire.

I further feel that that influence, that involvement will enhance the image of fire fighters and their work in the city.

• • •

Comments by the Court

(p. 148) Q It would seem to me that even though the Vanguards and the Fire Fighters have their differences with respect to the area of our concern here, just as a husband and wife have their differences in a domestic relation action, and in those years, twenty some years ago, when I used to handle the domestic relations docket in addition to other matters, people always scoffed at my required mandatory reconciliation programs. Well, I never had that type of optimism in believing I could solve all the problems of all the people, but by providing a forum for dialogue, discussion, I found that even in those cases that ended in divorce, that dialogue that took place in advance provided for a much better post-marital adjustment.

(p. 149) Well, it would seem to me that had that dialogue taken place with respect to this consent decree, it is entirely possible that filtered from the leadership of the Fire Fighters to the membership over that period of time there could have been an understanding, better comprehension, a better understanding of the objectives, the goals, the legal requirements, the constitutional requirements, the needs, the implications of these statistics, the implications of this evidence, the relationship of this case to the Shield case, the Hoolen case, what's taken place in Youngstown, Akron, this community, an examination, a review so that the leadership could be in a position to permit to be filtered down to the membership facts and circumstances,

what is going on, and we would have had either this, that they would have signed the consent decree or it could very well have put them in a position to challenge the City and say, "Hey, City, you are not getting a free ride on this. It's not we, the Fire Fighters, alone. We are not the ones that have caused the problem.

(p. 150) "Where are the mayors? Where are the directors? Where are the city councils in years past? Where are the government functionaries, those elected officials who made all their promises, where are they? We don't create the problem. You want to dump the problem on us. Why don't they share it?"

Okay. We've got John Doe down here. Sure, he's white. Maybe he's benefited over the years by the fact that he wasn't black and he was able to get his job and able to move up the ladder. But the fact still remains he's been a darn good fireman. His life's ambition has been to become a Battlion Chief. He's worked towards that goal.

Now, I understand it's the goal of minorities and they didn't have that chance, but where are the mayors in the past and where have the city councils and the directors been in the past?

Well, maybe the Fire Fighters want to talk to Council and the City. Maybe a way to get an adjustment here

and an accommodation is not merely by numbers of minorities (p. 151) and whites. Maybe an accommodation can be reached by saying, "City, wait a minute. You share the burden here, too. We don't want all the Fire Fighters being shafted because now we have to have in 1992 an accommodation in the form of a consent decree. Maybe we ought to create five more Battalion Chief jobs. Maybe we ought to create seven more lieutenants."

Did they have that opportunity to address and demand that of Council? No, because you foreclosed them from these negotiations. And I am saying at this juncture, gentlemen, I demand that due process take place at every facet of judicial proceedings.

I am going to at this time defer this proceeding until another day and I am mandating the City and the plaintiffs to engage the Fire Fighters in discussions, in dialogue. Let them know what is going on, hear their particular problems.

I am not suggesting that they have got a valid grievance, but I don't know whether they have. I don't know whether or not the (p. 152) City decided, "Well, this is the cheapest way, safest way. Let's get this out of the way." I don't know whether they have done it for political expedience or not. I don't know whether this was a darn good way of getting problems off the Mayor's back so he wouldn't have to deal with these problems, so he could deal with other problems. I don't know.

I have always known that agreements, good agreements, are those that spring from good solid debate

where all the controversy is tossed into the pot. And, of course, where the parties cannot engage in reasonable rational negotiations, then the requirement — the Judge comes in and manages these negotiations.

Well, maybe it took me a long time to get a resolution out of Youngstown and a long time to get a resolution out of Akron, but I will tell you, I had them all in the picture. And there were consent decrees, but I afforded the intervenors an opportunity of being heard.

Well, I'm not going to be a part of (p. 153) any decree that is going to drive a wedge, a deeper wedge in the relationship of a fire department or a police department. I much prefer that when I sign a consent decree it begins to bring the people together.

I think you people ought to spend a couple of weeks in further dialogue and I don't think the Fire Fighters are going to be able to win their position on the basis that, "Well, Judge, you know, there's something inherently wrong about quotas. You know it's not fair." We need more than that. All you've got to do is take a look.

We can argue all we want about quotas. They are preferences which have been mandated by circumstances and I have imposed them and I have seen the results of the imposition of those quotas, and it's produced good results, provided an opportunity, provided an opportunity that has been deprived in the past. It's tough for a person who is passed over because of a quota because he's a borderline white out of that 40 where there's a minimum of 16 (p. 154) minorities that are going in there. That leaves 24. When he or she is the 25th or 26th, I realize it hurts. But it's hurt in the past, too, and minorities have not been able to get their foot in the front door.

But it's going to take more than that to upset the consent decree. And I am not suggesting the consent decree is going to be upset. If I was a betting person right now, I would say that the consent decree in this case is probably going to be approved, but my concern is that there be some dialogue.

The Fire Fighters ought to be able to express their concerns to the City and to the Vanguards, the Vanguards and the City to you folks, and point out weaknesses, deficiencies, point out suggestions, alternatives, see if you can negotiate them.

I'm sorry that those who are ripe for promotion are going to be delayed for a few more weeks, but I think this dialogue has to take place. Maybe it's not required but it happens to be a matter that is troublesome (p. 155) to me, and even though maybe it takes me a little longer to wrap up these cases because I want that type of dialogue, I think it is important.

I can't see where the Fire Fighters or the Firemen that have served this community over the years have been the enemies of this community and they ought not to be treated as enemies by being excluded from this dialogue.

I am going to defer this proceeding for two weeks. I want some good honest, hard dialogue taking place by all the parties. I will set another date and time for the conclusion of this proceeding. My staff will call each of you on Monday, talk to you around the horn and agree on a convenient date and we will set aside a whole day or day and a half to wrap up this proceeding.

I would like to get a feel for, just on an informal basis, sitting down with all three of you, just what went

into this consent decree, the requirements of it, what problems the Fire Fighters have with it.

You know, if the Fire Fighters just take an obstinate position — "We are (p. 156) unalterably opposed to the quotas" — they are going to fail because I think statistically Mr. Maddox and Mr. Stege are going to be able to support the need and necessity for those quotas.

But perhaps there are some modifications. Maybe somewhere within that we can make this whole thing a little more palatable. I don't know. Maybe there are valid grievances, maybe there are not, but I would like to know whether there are before I put my stamp of approval on this because I am hopeful that when I put my stamp of approval on a consent decree here that it is more than just legal formality and that this Court has played some role in making the Fire Department of the City of Cleveland and the City of Cleveland just a little better and that the relationship between human beings in this community is a little better.

It's not just Cleveland but because Cleveland is the center, vital part of the northern part of the United States, and if Cleveland is solid and the communities adjacent to it become more solid, then the (p. 157) state becomes a little better and, in turn, the whole country.

I just can't treat matters of race relations, human beings, just as another lawsuit. It's important, something vital. So I think we should talk it over a little bit more. Give me a better understanding of it. I don't think it will affect the vital vested interests of anyone that substantially by making everybody wait a couple more weeks.

We will be in touch with you on Monday as to a date. In the meantime, I'm expecting some intensive dialogue

between all the parties in this case so that we can get a better view of the spirit of this consent decree in a couple weeks.

That will be it, gentlemen. Thank you. (Court was adjourned.)

No. C80-1964

MINUTES OF PRE-TRIAL PROCEEDINGS
UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF OHIO,
EASTERN DIV.

DATE 1-21-82 JUDGE THOMAS D. LAMBROS

VANGUARDS OF CLEVELAND,

Plaintiff,

v.

CITY OF CLEVELAND,

Defendant,

LOCAL 93 FIREFIGHTERS UNION,

Intervenors,

(Filed January 21, 1982)

Attorney for Plaintiff, Charles Delbaum

Attorney for Defendant, Maddox; LeBarron

MATTERS CONSIDERED: For Intervenors: Brucato

Intervenors are to review the proposed consent decree and determine their specific objections, if any, and present any suggestions for alternatives.

Negotiations are to determine whether matter can be resolved without objection hearing. If not, issues for objection hearing are to be specifically defined as a result of the discussions.

Hearing tenatively set for 2/24, Wednesday @ 10 A.M.

/s/
DEPUTY CLERK

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS COMMENCING APRIL 27, 1982

(p. 2) TUESDAY, APRIL 27, 1982, 10:30 A.M.

Comments by the Court and Counsel

The Court: Good morning.

This morning we resume proceedings in the case entitled The Vanguards of Cleveland, Plaintiffs, versus the City of Cleveland and others for the purpose of inquiring further into a proposed consent decree which was lodged on November 2, 1981.

The purpose of this hearing is to inquire into the fairness, adequacy and reasonableness of the proposed consent decree. After the consent decree was lodged, notice of the consent decree was caused to issue pursuant to an order of this Court.

The Court commenced hearings on this matter in January. Local 93 has intervened in this action and has objected to the proposed consent decree.

At the conclusion of the proceedings in January, the parties were directed to engage in a dialogue in an effort to resolve disputes between the consenting parties and the intervenors. Alternatively, the Court suggested that if a resolution could not be achieved that the parties seek to narrow and define the (p. 3) issues on which any further evidence was to be presented at this hearing.

It is my understanding that the intervenors have submitted their proposals to the plaintiffs and the consenting parties who are the proponents of the consent decree. Further, it is my understanding no resolution has been reached and that in essence it is my understanding that the basis of the intervenors' proposal is to substitute a training pro-

gram for promotion candidates instead of initiating a quota system.

My review of the proposal of the intervenors and the thrust of their argument in support of the proposal of a training program as a substitution for a quota system is, in essence, that the resolution in the Headen case adequately cured discrimination in the Cleveland Division of Fire at the hiring level and that given necessary time, that the proposed training program will have the effect of causing the resolution in the hiring level to filter upward into the officer ranks.

We resume today to consider further the adequacy, reasonableness and fairness of the (p. 4) consent decree, but initially before proceeding with any further evidentiary presentation, if counsel feel there is necessity therefore, and prior to hearing the further arguments of the parties, the proponents and the intervenor objector, for the record, would counsel relay to me what efforts have been undertaken in an attempt to resolve the dispute since the January hearing?

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Mr. Stege: I don't have a precise chronology in front of me, but immediately after we adjourned in January, I believe it was on the 8th, the parties, counsel for the parties met and discussed in moderate (p. 5) detail some of the issues that we faced and worked out an agenda to meet further to discuss them.

We had some difficulty working our schedules together, but nonetheless we did meet, we did have at least

one discussion that I would call far-reaching in terms of going into once again the rationale behind the consent decree, and some of the reasoning behind it.

At that point we adjourned, Local 93 apparently deliberated and came up with its proposal. That proposal has been referred to by your Honor, and I reviewed that proposal with my clients and sent a letter to Local 93's counsel indicating that while we felt the proposal was made in good faith, the parties were just too far apart to make it realistic or practical for us to sit down and embark, and we were just really miles apart on the essential ingredients of remedial relief.

The plaintiffs believe that remedial relief is appropriate and, as I read there the proposal of Local 93, they believe it's inappropriate. And I just don't think that (p. 6) realistically there is any basis for further discussions, and I say that in all sincerity and good faith, our perspective.

That's all.

The Court: Thank you, Mr. Stege.

Does the City wish to be heard?

Mr. Madden: Just briefly, your Honor. I concur with what Mr. Stege said; there was more than one meeting of attorneys, there was correspondence, I met with my principals at the City to discuss the proposal submitted by Local 93.

There were subsequent phone calls. It became at least apparent to me that the Vanguards had a certain position with regard to proposed promotion goals which we had concurred in with the consent order, and there was a certain degree of inflexibility on the part of the union to consider any sort of promotion goals, and that seemed to me to be an essential part of all three parties getting together.

I went back as recently as two or three days ago, called one of the attorneys for the (p. 7) union to see if again there was perhaps any basis of flexibility to see if the parties could get together, and I understand Mr. Andrews was unavailable at that time and there was no response. So I assume they were not able to talk to him further about the matter.

That's where it stands, and I don't see that we are any closer together than where we were when we left the Court in January.

The Court: Mr. Summers, on behalf of Local 93.

Mr. Summers: If it please the Court.

The Court: Counselor.

Mr. Summers: Statements that have been made by both Mr. Stege and Mr. Madden are in fact correct. Good faith efforts were in fact made by all parties to resolve this.

Your Honor, a mandate by the membership of a local is a very strong thing. I would add just as an aside that our inability to reach Mr. Andrews last week and this week, late last week and early this week is due to the fact that his brother has just passed away and he has been in Michigan, and today is the first (p. 8) day back and the memorial service here will be this evening. It was a long protracted illness and did in fact keep him away from the City a great deal over the winter.

The problem comes down, and I say this with all due respect for the law, to the distinction between the need for remedial help and the need by all concerned people to look for alternatives.

We have requested something that we feel is not so totally revolutionary, we wonder whether or not the law is in such a state of inflexibility that the quota systems, the remedial effect imparted to people by the quota systems will not, as we have seen many other unpalatable things, finally be put to rest.

And the way that that can happen, your Honor, Local 93 feels is by entrance level, getting the men on the job and from that point on letting the true spirit that the framers of charters and the framers of constitutions in fact put forth and have held forth all along.

Merit, ability to understand the job, initiative to study, and the ability to take a (p. 9) fair test do 14 be paramount to the use of remedial measures. This is our feeling. There have been recent decisions, one of which we have submitted with our presentation, where courts are beginning to say "Yes, perhaps it is a new day." Many, many of the cases that we read, your Honor, were joint requests and by that I mean "Let us get more minorities on the job and let us have remedial measures in regard to promotion."

It is Local 93's position, and I am making this by way of, despite the fact that it's a little bit outside the scope of the request of the Court, I am making this by way of basically an opening statement to begin; it is the feeling of Local 93 and a very, very large majority of the voting people and members, I mean at the time that this was brought

up, to look for ways that would escape the necessity of a remedial quota system, to cause a tremendous amount of racial bitterness in a job where it is absolutely uncommon for one fire fighter day-in and day-out to not have to rely on at least one other fire fighter to stay alive.

(p. 10) I think that we are all under an obligation to not just say "Well, remedial has been the handmaiden of repair in the past, and therefore it will be good in the future." I don't think that even those that had argued it from the very beginning contemplated that forever it would be around to cause the disorder that it causes.

I would say that there are very few Americans that in fact do believe in discrimination, but more importantly at least from the point of Local 93 very few Americans believe that forever a leg up is necessary to cure past problems. And as a result of that, Local 93 feels that the consent decree should not be signed and that we should go forward with the justification, and we feel that the proposal that we have made will in fact, over its life, preview for the spirit and the true meaning of what the people of this community want by way of promotion as far as gaining their jobs.

* * *

(p. 17) The Court: How many promotions are presently available? Is that as it was stated in the stipulation previously filed?

Mr. Stage: There are, yes, there may have been some attrition since then but I think it's pretty much close to that. There are presently available 66 lieutenant promo-

tions if they promote them actually. That was as of December 31st.

The Court: What is the present posture of the City and the Division of Fire with respect to whether or not it intends to or whether or not it is able to fill the maximum promotions that are presently available?

Mr. Maddox: The City does not presently plan to promote to 100 percent actual strength. It can promote the consent (p. 18) proposed numbers, though, without reaching that actual strength level, and it is certainly the intent of the City to implement that should the consent order be adopted.

The Court: What would those numbers be at the present time, roughly?

Mr. Maddox: Your Honor, that would be referring to page four of the proposed consent order. In the lieutenant rank from the first 40, 16 would be minority.

The Court: Would that imply that the City is prepared to promote 40 to the rank of lieutenant?

Mr. Maddox: That's correct.

The Court: And then 20 to be promoted to the rank of captain?

Mr. Maddox: That's correct, your Honor.

The Court: Ten to the rank of battalion chief and three to the rank of assistant chief?

Mr. Maddox: That's correct, your Honor.

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Comments by the Court

(p. 145) The Court: I don't know whether or not numbers make a difference, and certainly (p. 146) that's what we are involved with is numbers. And when we get to a quota, the whites are saying "Well, listen, but for the quota I was next on the list and I had to make a sacrifice."

And, you know, I am just wondering whether or not if we dealt in numbers, and maybe if the City would come forward and say "Listen, let's take a look at the whole problem and say okay, what I'm trying to avoid here is, as the City leadership, is what is going on in this courtroom with the Vanguards on that side of the courtroom and the fire fighters on that side of the courtroom."

I would hope we wouldn't have to have a fire department that is divided in that respect. I just wish it were possible that the fire fighters and the Vanguards could come together and say "Okay, you know our position, let's try to deal with this effectively so we are not on opposite sides of the courtroom as we are here today."

I'm wondering whether or not if we could start dealing in terms of some definitive (p. 147) numbers, whether or not we could come to an agreement based on a one-time basis leaving the future for consideration on a year-to-year basis, depending upon how the entry level is coming, how the program on future examination is doing.

I am wondering, we are talking about 40; is it possible that we can talk about 66 lieutenants? And rather than 20 captains, 32 captains and rather than ten battalion chiefs, we talk about 14? Or depending upon what has happened since, maybe these figures are increased, I am wondering whether or not we can bring both sides together and say

"Listen, let's deal with this right now. Let's deal with this right now and let's split them right down the middle 50/50 on a one-shot deal, and then we will take a look at next year and the year after and the year after and see what happens."

I'm wondering whether or not we ought to dig our heels in and deal with it, let's bring this fire department up to its full officer strength, let's deal with the numbers, (p. 148) let's hit it right down the middle and let's get these people promoted. And then we then plug in a substantial number of black leadership that can start having some influence in the operation of this fire department, and the other minorities that haven't sought these jobs before, and they are now going to see a significant number of minority officers and they are going to be attracted to come on the force.

I would like to see all of you do that, and if all of you do that this thing will naturally work itself rather than our having to constantly force it and plug it.

I am just wondering whether or not we ought to bite the bullet and deal with it right now, and then we sit back and see how it works. And if it doesn't work, we will make the necessary adjustments, but I am wondering whether or not the City would entertain taking a look at the numbers and see if we can — in other words, if we are asking the fire fighters right now to forego promotions that they had been looking for, (p. 149) why don't we also ask the City now to assume some burden and responsibility and to increase the number so perhaps then we can bring the fire fighters and the Vanguards together and say "Okay, here is the whole situation. We know what's involved totally, let's come to an agreement on numbers and let's go away happy and work together."

I don't know what this Atlanta agreement is. I don't know what this one-time program was. My interest, of course, in it is now inspired by reason of the inquiry by the City, and that the president of the national fire fighters was at the summit meeting agreeing to this whole program is the type of result I'd like to see accomplished here. Maybe it's not possible. They refer to it as a historic agreement.

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(p. 136) What we have right now is a single consent decree proposal, and it's a question either the Court accepts or the Court rejects it. They have taken a look at the consent decree. Whether or not they have a sound legal basis, sound factual basis or whatever basis, they have taken a position based on this consent decree in this form and based on the quota as outlined here that "We are opposed to it," and of course they have taken the position that "We are inalterably opposed to the quotas."

Well, there is no question we are all opposed to quotas and we find a quota system repugnant. We found it repugnant over the years when persons of certain national origin were not able to come to the United States of America because of such a restrictive quota (p. 157) system, and it wasn't until the mid '60's that those quotas went out substantially and permitted persons who could not come to the bristling shores of the United States either on the east or west to enter this country.

But remedially the courts have found it necessary to deal with the powers of dismantling the effects of decades

of discrimination, to deal with past discrimination in this regard. So we have found it as the only remedy available in many instances to deal with past acts that did not comport with the constitutional laws of the United States.

We keep searching for other alternatives, we hope that we find them. But it is an acceptable proper way of dealing with it. The Supreme Court has conveyed that mandate, but that, of course, should not take away from us in each individual case the incentive to be creative to deal with our own problems, the problems here in this community.

No one knows the problems in this community better than each of you and the people that you represent. You don't need a (p. 126) Supreme Court or a Court of Appeals or a Federal Judge to tell you how to deal with this problem because nobody is aware of the problem here better than each of you. And it is my hope and my desire notwithstanding the fact that we are into this matter, we developed a record in this matter and we are shortly ready to conclude this matter; it's always my hope and it always has been my desire to in every case, whether it's a civil rights case, an anti-trust case or whether it involves just two people involved in an automobile accident, I like to see, even though it is an optimistic view and I like to maintain that optimism in seeing people work out their own affairs and walk out of the courthouse and down the courthouse steps arm-in-arm, at least that they made an effort to work together, to put together and resolve their problem.

That is not to suggest that court-mandated resolutions don't have the effect over a period of time of resolving the problem. But there are different schools of thought among judges. Some judges feel their primary (p. 139) mandate

is to sit on the bench and to mandate and order and issue judgments and to declare what your rights and your rights and your responsibilities and your responsibilities are. I've always viewed my primary role as a conflict resolver and to try to create an atmosphere and environment within which the disputing parties can resolve their own problems, and it is my hope that we can find that solution yet.

I'm not suggesting that the fire fighters shouldn't have their Local 93 and the Vanguards shouldn't have that from now and forever more. I would certainly like to see 93 be a part of the Vanguards and the Vanguards a part of 93, and that the primary mission and goal of each of these individuals is to create a better working atmosphere for themselves and that ultimately that the people of the City of Cleveland are happy with the quality of their fire service that is available.

But ultimately, that even through our effort here, that we make our life and our society a much better one, that because it's (p. 169) through the resolution, the resolution of these disputes here in Cleveland, Detroit, Atlanta, people working out their problems, and I think that eventually makes hopefully our dream come true.

There has got to come a stop to fighting among human beings. You know, when you stop to think about it, when you stop to think about it, to our knowledge and even Carl Sagan's explorations into space with his telescope, we haven't yet found another planet in this vast universe of space where there is any existence and nowhere where there is anyplace where there is human existence; only on this little planet Earth.

And yet on this own little planet Earth, where we have the great miracle of human existence, we as humans are constantly struggling and hurting each other rather than making it possible for one day when someone from outer space comes down and visits us that we can all welcome him with an open hand and say "Listen, we do value our human existence."

And we have got to find our answers (p. 161) and so it may be another lawsuit to others, but to me it's the existence of our community, the existence and our ability to tell our children that at least we did our share in putting this whole, whole idea together; at least we made our contribution.

I realize immediately the first concern is jobs, job security and each person's financial security and employment, well-being. That's important, there is no question. I think I would like to try to serve those particular purposes and also achieve a much greater goal of I would like to see the Vanguards and the fire fighters really make a major step forward; perhaps too optimistic, perhaps each of you are saying "Judge, get down to your business and just pass on this decree; is it fair, adequate, reasonable?"

Well, those are merely words and no matter if I say those words ultimately there is going to be a segment of our community that says "You are right," and then there is going to be another segment that says I am wrong. And I would like to make that effort to see if (p. 162) we can resolve the whole problem.

Maybe there are no other solutions, and I am not talking about a lengthy delay. I am talking about getting with

it and exploring some other alternatives without, of course, the Vanguards or the City having waived any of its rights to have this agreement tested. Any agreement, of course, is a compromise; you have reached a compromise with the City of Cleveland. The fire fighters are in disagreement with this. They cannot be ignored, they are part of the community, they are part of the fire service, and we have the power and authority, depending upon what's involved, to rule here.

I don't want to rule here over anybody unless there is a clear mandate that has to be ruled on. I would like to have the parties be the judges here as to what the best solution is. I'd like to tear down the barbed wire and that we all smoke the peace pipe, if that's an appropriate term, for awhile in attempting to resolve our problem.

I haven't looked at the agreement. (p. 163) Maybe it's not in the cards, maybe they are so entrenched in that position that there is no negotiation. Maybe each side has taken the position of unconditional surrender. If that's the position, then we are not going to solve anything.

I would like the opportunity in an informal session meeting, of course, with the fire fighters, and I would like the opportunity to meet in private session, if necessary, with the Vanguards. And then hopefully we get together across the table, we can negotiate, but we are going to need the cooperation of everyone, the fire fighters, the Vanguards and the City to deal with the overall problem.

But I'd like to have through this lawsuit the Vanguards and the fire fighters take a look at every other lawsuit there is preceding and say "We don't know what the heck you people have been fighting about over the

years. We have been able to solve a problem and done a better job on it."

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(p. 180) THE COURT: I want to be satisfied that when I pass on the question of fairness, adequacy and reasonableness, that it is every bit that and then when I deal with the problem of adequacy, fairness and reasonableness it is not just dealing with formalities and numbers and cases and doing that which every other community has done.

I want to ultimately through this lawsuit improve the human relations in the City of Cleveland. And when I pass on the fairness, adequacy and reasonableness, I want to have some sense of satisfaction when I walk out of here that it truly is reasonable, not because two lawyers representing two sides have advanced it as fair and reasonable.

(p. 181) I want to make sure it really is. And then it's going to take everybody's work, not just my work. It's going to take City Council, it's going to take the Mayor, it's going to take the law department, it's going to take the safety director, it is going to take the Vanguards, it's going to take the fire fighters, it's going to take the lawyers, and I don't want the decision to be mine.

I merely want to create the atmosphere where all of you people are going to resolve this problem. And just because this consent decree may be tailored after some other consent decree that was worked out in some other judge's courtroom, doesn't make it reasonable as far as I am concerned. It makes it cognizable and that's a factor I will take into consideration.

But I would like to have each case, each year be a little better and come up with a little different idea and a better idea than somebody else came up with. Maybe this is a better idea, but I want to make sure before I say yes and approve it or reject it that we have fully explored it.

(p. 182) I would like to see the lawsuits in the State court end, too. I would like to see these examinations graded and I would like to see next week we are on the road to promoting people; not with the sense of bitterness, but I'd like to have the fire fighters and the Vanguards say "Listen, that judge tried, we have got problems, we all have to make some compromises. Let's take it and do it, let's end this fight and battle," but it is going to take us all to do it.

And I know with all due respect I have been involved with city councils and mayors before in these cases, and nobody wants to make a decision. "Listen, you know, after all, we have a constituency to worry about; let's dump it on the federal judge."

And I am willing to have it dumped on me and I am willing to decide it, but frankly I want you all to share in the decision process. And that's all I am suggesting right now.

I see the agreement, I understand it, it may be the best agreement. Let's see if we can work off something better. Today is (p. 183) Tuesday, I am not going to hear the final arguments right now. I can hear them tomorrow at 1:30.

Why don't you come here tomorrow, present your final arguments so the case is submitted, and at least give me each your tentative views whether or not we can take a

look at another program. And if there is another program we can take a look at it, we will get busy and structure it and if necessary we will work around the clock to put it together so we can get those examinations graded and get the people on the department.

But let's take one more look.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASERN DIVISION

CASE NO. C80-1964

JUDGE THOMAS D. LAMBROS
MAGISTRATE DAVID S. PERELMAN

THE VANGUARDS OF CLEVELAND

Plaintiffs

vs.

THE CITY OF CLEVELAND, ET AL

Defendants

REPORT OF MAGISTRATE

I am transmitting herewith a copy of a proposed amended consent decree. This draft represents the culmination of something in the neighborhood of 40 hours of meetings conducted by me, at the direction of the Court, spread over eight dates, most of which were held with representatives of the Plaintiff and the Intervenor at hand for consultation.

Unfortunately, I cannot tell you that it is an agreed entry ready for your signature. What it represents is a draft proposal that all counsel are satisfied is an appropriate vehicle for settlement of this litigation. While counsel for Plaintiff and Defendants are able, under the authority from their clients, to conclude a binding agreement, Mr. Summers is not in that same position.

In order for Mr. Summers to bind the Union, the proposed decree must be submitted for a referendum vote be

the general membership. It has been clearly understood by all concerned that if the union does not approve the decree plaintiff and defendants are free to present to the Court this proposal or any other form of proposed consent order they may formulate. Likewise, if the general membership does not approve, Mr. Summers is not bound to acquiesce in any of the provisions of this proposal and may oppose any of its terms if incorporated in a proposed decree submitted by the principal parties.

Acceptance by the general membership has always been recognized as touch and go proposition. It was, however, believed that a favorable recommendation by Mr. Summers and the Union's Executive Board would be given serious consideration by the general membership. Unfortunately, recent events having no bearing on this lawsuit, pertaining to the proposed closing of five stations, have again strained relations between the firefighters and the City. Counsel fear that these feelings may rebound in a negative vote on this issue. It can only be hoped that the general membership will realize that voting down this proposal is not a way of getting back at the City and that rejection based upon such reasoning will simply delay the day when the firefighters can stand together, without regard to race, and pursue their common interests and goals rather than wasting available resources, financial or otherwise, by engaging in intramural battles. Realistically, however, there is little room for optimism at this time.

It does please me to be able to report that this proposal came about as the result of a high level of cooperation by all counsel. This is not suggest that the negotiations and discussions were without their problems or heated moments. Recognizing the different interests each of the attorneys was representing, the depth of emotion that litigation such as this sparks in clients and the obligation that each counsel had to act as advocate presenting his client's perspective of what is fair, reasonable and necessary, each of the attorneys involved was still able to recognize that there exists a serious problem which must be solved and that the only way such a solution could be achieved was with an open mind towards conciliation.

As a quick comparison of this proposal with that which you previously received will disclose, this amended decree is different from that submitted to you last year. It incorporates a modification of the Atlanta plan, and provides for a very large number of promotions to be made from the 1981 eligible lists.

During the entire course of the discussions a major point on the part of the City was that its discretion in establishing manning levels was neither an issue in this case nor negotiable, and a provision has been incorporated into the decree specifically acknowledging that manning was not at issue. The City's agreement to make the number of promotions contained in the present proposal to levels beyond those considered prior to this time, which will work to the benefit of both minority and non-minority firefighters, must be considered as a significant concession in light of this strongly held position.

The decree also includes minority maintenance levels covering the next two promotional years. The percentage of representation levels agreed to are somewhat lower than those sought in the earlier proposal, and the guaranteed duration of the maintenance levels, unless extended, is reduced from nine years to five years.

Agreement on the shorter duration for the decree was facilitated by the City's agreement to reduce the eligibility requirement for Lieutenant to three years service and to test at eighteen months, rather than two years, intervals for the next two examinations. This means that virtually all minority members presently in service will be eligible to test for Lieutenant while covered by the decree.

The manner in which seniority ranking would be established was a major point of discussion. These discussions started with the concept of merged parallel eligible lists, which was objectionable to intervenors. A number of other alternatives were explored, each of which presented some deficiencies. Ultimately, a compromise was reached with agreement that for 1982 merged-list coupling would be used for seniority purposes and that for 1984 and 1985 test ranking would control.

This led to another major point of difference, the question of the utilization of seniority points as a promotional factor. The original proposals sought to eliminate seniority points. This was a matter of great consequence to the Union, which recently won a Common Pleas lawsuit against the City in order to retain seniority points. It was finally agreed that for the tests through 1985 seniority points would remain, with plaintiff reserving the right to prevent a challenge at some later point in time if it appeared that seniority points could result in discriminatory exclusion of minorities from promotional opportunity.

These represent the major changes incorporated into the proposed decree. As is obvious from this brief summary, some of the three interested parties secured every-

thing that they would have liked on behalf of their clients. There was give and take on all sides, but not in any arbitrary sense.

All counsel approached these discussions with an understanding of what the current state of the law demands in a civil rights case such as this, an understanding that is not always shared or accepted by a client such as the Union which often perceives gains by minorities as losses by non-minority members. Counsel also conducted the negotiations with the realization that in order to settle any lawsuit compromises must often be made from points which could be won if the case was to be taken through the full range of trial and appeal, a position which minorities at times find difficult to accept when asked to compromise by accepting less than they believe the law entitles them to. Each of the counsel, including those representing the City who were concerned that any settlement not extend beyond what they perceived the legitimate issues of the lawsuit to be, was thus presented with the difficult burden of advancing their client's concerns while at the same time seeking to arrive at an agreement structured upon the mandates of the law but not ignoring the realities of what was reasonable under the circumstances. I believe that they are all to be commended for their efforts and hope that all the hard work undertaken in the spirit of reason and reconciliation will not be in vain.

At any event, at this juncture my assigned responsibility has been discharged. With the formulation of a proposed order acceptable to all counsel there is nothing further for me to do, and I am returning as much of the original file as was provided to me. You will be advised by Mr.

Summary as to the outcome of the general membership referendum vote.

/s/ David S. Fleelman
United States Magistrate

DATED: November 12, 1982

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CIVIL ACTION NO. C80-1964

JUDGE LAMBROS

THE VANGUARDS OF CLEVELAND

Plaintiffs,

vs.

THE CITY OF CLEVELAND, et al

Defendants,

and

LOCAL #93, et al

Intervenors.

PLAINTIFFS' MOTION FOR APPROVAL OF AMENDED CONSENT DECREE

Now come the plaintiffs and move this Court for an order approving the attached amended proposed consent decree as fair, reasonable and adequate and entering judgment thereon.

Respectively submitted,

STEGE, DELBAUM & HICKMAN CO., L.P.A.

By: /s/ Edward R. Stege, Jr.
1800 Standard Building
Cleveland, Ohio 44113
(216) 963-0300

SERVICE

A copy of the foregoing was served upon John D. Madden, Esq., Director of Law, Room 106 — City Hall,

601 Lakeside Avenue, Cleveland, Ohio 44114 and William L. Summers, Esq., 1818 Standard Building, Cleveland, Ohio 44113 this 11th day of January, 1983 by regular U.S. mail.

/s/ Edward R. Stege, Jr.
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CIVIL ACTION NO. C80-1964

JUDGE LAMBROS

THE VANGUARDS OF CLEVELAND
Plaintiffs,

vs.

THE CITY OF CLEVELAND, et al
Defendants,

and

LOCAL #93, et al
Intervenors.

MOTION FOR AN ORDER TO SHOW CAUSE
(Filed January 1, 1983)

Now come the plaintiffs and move this Court for an order providing notice to class members of the submission of an amended proposed consent decree to this Court by the plaintiffs and the defendants; and for an order directing all class members and the Intervenors to file their objections to the proposed amended consent decree by January 25, 1983; and for an order directing all class members and the Intervenors to show cause why the decree should not be ruled upon without the necessity of any further oral submissions by any interested party. A copy of a proposed order is attached hereto as Exhibit 1.

Respectfully submitted,

STEGE, DELBAUM & HICKMAN CO., L.P.A.

By: /s/ Edward R. Stege, Jr.
1800 Standard Building
Cleveland, Ohio 44113
(216) 861-0300

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C 80-1964

THE VANGUARDS OF CLEVELAND, et al.,

Plaintiffs,

v.

THE CITY OF CLEVELAND, et al.,

Defendants,

and

LOCAL NUMBER 93,

Intervenor.

LAMBROS, DISTRICT JUDGE

ORDER

(Filed January 19, 1983)

It appearing that plaintiffs' motion for an order to show cause is well taken, it is hereby ordered as follows:

1. A copy of the Notice of Settlement, attached hereto as Exhibit A, shall be delivered by the City of Cleveland forthwith to each and every Black and Hispanic firefighter presently employed by the City of Cleveland by interdepartmental mail, personal delivery, or ordinary mail.

2. All class members and Intervenor, International Association of Firefighters, Local 93 (hereinafter "Local 93"), who object to the amended proposed consent decree, shall file their objections to the amended proposed decree in writing to this Court on or before January 27, 1983. Such objections shall describe with particularity why the

amended proposed consent decree submitted to this Court on January 11, 1983 should not be approved forthwith as fair, reasonable, and adequate and shall include a description of such alternative provisions which the objecting party believes to be appropriate.

3. All class members and Intervenor Local 93 who file objections to the amended proposed consent decree shall show cause in writing on or before January 27, 1983 why this Court should not make a determination on the fairness, reasonableness, and adequateness of the amended proposed consent decree without any further evidentiary hearings in addition to those held in January and April of 1982.

4. In the event that any class member or the Intervenor takes the position that further evidentiary hearings are necessary, said class member or Intervenor shall submit in writing, on or before the date specified in paragraph three above, the following particulars:

a. The names of witnesses he/it intends to call at such an evidentiary hearing and a detailed description of their testimony;

b. A detailed description of all documentary or other nontestimonial evidence he/it intends to present at such an evidentiary hearing;

c. A written explanation of why each individual item of intended evidence referred to in a. or b. above (i) is not cumulative to that already introduced in prior hearings; (ii) is relevant to consideration of the January 11, 1983 amended proposed consent decree as distinct from the November 5, 1981 proposed consent

decree; and (iii) was not submitted at prior hearings in this matter.

5. The plaintiffs and the defendants shall have seven (7) days to respond in writing to any submission received pursuant to paragraphs two through four of this order.

IT IS SO ORDERED.

/s/ Thomas D. Lambros
United States District Judge

DATED:

EXHIBIT A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CIVIL ACTION NO. C80-1964
JUDGE LAMBROS
THE VANGUARDS OF CLEVELAND

Plaintiffs

vs.

THE CITY OF CLEVELAND, et al

Defendants

and

LOCAL #93, et al

Intervenors

NOTICE TO CLASS MEMBERS

TO: ALL MINORITY FIREFIGHTERS EMPLOYED BY THE CITY OF CLEVELAND, DIVISION OF FIRE

Pursuant to an order of Judge Thomas D. Lambros of the United States District Court for the Northern District of Ohio, dated January 18, 1983, notice is hereby given that an amended proposed consent decree for the resolution of this litigation has been submitted to this Court for approval and that this Court intends to rule upon the amended proposed consent decree without further evidentiary hearings unless good cause is shown by any interested party as to why further evidentiary hearings should be held. The terms of the settlement are set forth in the amended proposed consent decree received by the Court on January 11, 1983. The settlement has been agreed to by counsel for the Vanguards and counsel for the City of Cleveland. The settlement has not been agreed to by counsel for Intervenor International Association of Firefighters, Local 93.

This notice is directed to any individual who is a Black or Hispanic firefighter presently employed by the City of Cleveland, Division of Fire.

DESCRIPTION OF THE ACTION

The complaint initiating this litigation alleges that the City of Cleveland and various city officials have violated Title VII of the 1964 Civil Rights Act and certain other federal statutory and constitutional provisions by maintaining a system of hiring and promotions in the Division of Fire which discriminates against minority persons on the basis of race and national origin. Minorities are, for the purposes of this lawsuit only, defined as Black and Hispanic persons. The complaint seeks relief from these practices in the form of an injunction against future discrimination; an affirmative program of hiring and promo-

tions which will compensate for prior deficiencies; damages including lost wages for those wrongfully discriminated against; and costs and attorney's fees. Plaintiffs' complaint was filed on October 23, 1980.

On June 5, 1981 the Court approved a request by Local 93 of the International Association of Firefighters, AFL-CIO to intervene in this case. Shortly thereafter, Local 93 filed a pleading which stated the Local's objections to any future system of promotions which would attempt to compensate for prior acts of discrimination by the use of racial preferences.

Shortly after this lawsuit was begun, a series of negotiations was entered into between the attorney for the Vanguards and the attorney for the City in an effort to settle all aspects of this lawsuit relating to promotions. After approximately one year of discussions and negotiations an eight page consent decree was presented to this Court for approval on November 5, 1981. Notice of this proposal was given to each class member and evidentiary hearings were held on the proposed consent decree on January 6 and 7, 1982 and April 27 and 28, 1982.

In late September of 1982 a series of new discussions were commenced with the assistance of United States Magistrate David S. Perelman which involved all three parties to the litigation, including Local 93. A revised consent decree emerged from these discussions in late November, 1982 which was submitted to Local 93's membership for ratification. The revised decree, however, was not ratified by the membership.

On January 11, 1983 The Vanguards and the City submitted an amended proposed consent decree patterned

closely after the revised decree rejected by Local 93's membership. It is this January 11, 1983 decree upon which this Court must rule. This notice should not be understood as an expression of opinion regarding the merits of the claims or defenses of any party to the lawsuit nor regarding the merits of the proposed settlement.

THE CLASS

As indicated previously, the persons whose rights are or may be affected by an order of the Court are any minority individuals who are presently employed as firefighters, including promoted officers who are minority, by the City of Cleveland, Division of Fire. "Minority" in this context means Black or Hispanic.

THE PROPOSAL

The amended proposed consent decree provides that the City may no longer use any criteria for promotion except those which are non-discriminatory and job related. It provides that seniority points are not to be used for promotions through 1987 but that jurisdiction in this Court is reserved to determine their use thereafter.

The proposed settlement creates an affirmative action plan which will last through 1987, subject to a reservation of jurisdiction in the Court giving this Court the power to amend or modify the plan. The affirmative action plan embodied in the proposed decree provides in essence as follows:

1. All minorities presently holding the ranks of Lieutenant and above and who have passed the November, 1981 examinations will be promoted to the next higher rank. Sixty-six promotions shall be made promptly to the rank

of Lieutenant. Of these thirty-three shall be minority. If there are not thirty-three minorities who have passed the November, 1981 examination, the shortfall will be made up from the next examination before any other promotions are made.

2. New promotional examinations are to be held in 1984 and 1985. During the life of the lists created from those examinations, certain percentages of minority representation must be maintained as a result of promotions to each rank. These levels are as follows:

	Lt.	Capt.	B.C.	A.C.
1984 List	23%	10%	10%	20%
1985 List	25%	20%	20%	20%

The 1985 eligible list shall be maintained for two years.

3. Minorities must establish their eligibility for such promotions by passing a job-related promotion examination. If the list of qualified minorities is exhausted, the City has the option of promoting non-minorities to existing vacancies.

4. The formulas referred to will remain in effect unless modified by a subsequent ruling of this Court.

The proposed settlement does not provide for any monetary award of back pay or damages to the members of the class. The proposed settlement does indicate that the City will not oppose an application by plaintiffs' counsel to this Court for reasonable attorney's fees.

Counsel for Vanguards is Edward R. Stege, Jr. Mr. Stege is likewise counsel for the class of persons receiving this notice. Mr. Stege and the Vanguards recommend that

each member of class accept the amended proposed settlement as being in the best interests of all members of the class.

YOUR RIGHTS

Any class member who objects to the proposed settlement of this action in accordance with the terms of the proposed amended consent decree shall comply with paragraphs two through four of an order issued this date which reads as follows:

> 2. All class members and Intervenor, International Association of Firefighters, Local 93 (hereinafter "Local 93"), who object to the amended proposed consent decree, shall file their objections to the amended proposed decree in writing to this Court on or before January 27, 1983. Such objections shall describe with particularity why the amended proposed consent decree submitted to this Court on January 11, 1983 should not be approved forthwith as fair, reasonable and adequate and shall include a description of such alternative provisions which the objecting party believes to be appropriate.
>
> 3. All class members and Intervenor Local 93 who file objections to the amended proposed consent decree shall show cause in writing on or before January 27, 1983 why this Court should not make a determination on the fairness, reasonableness and adequateness of the amended proposed consent decree without any further evidentiary hearings in addition to those held in January and April of 1982.
>
> 4. In the event that any class member or the Intervenor takes the position that further evidentiary hear-

lic Square, Cleveland, Ohio. This Court file includes a copy of the notice which was delivered to the members of the class in December of 1981 and which summarizes the consent decree as originally submitted on November 5, 1981. Copies of this December, 1981 notice are also available from counsel for the plaintiffs: Edward R. Stege, Jr., 1800 Standard Building, Cleveland, Ohio 44113 (216/861-6360).

THOMAS D. LAMBROS
UNITED STATES DISTRICT JUDGE

Dated this 18 day of January, 1983.

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ings are necessary, said class member or Intervenor shall submit in writing, on or before the date specified in paragraph three above, the following particulars:

a) The names of witnesses he/it intends to call at such evidentiary hearing and a detailed description of their testimony;

b) A detailed description of all documentary or other non-testimonial evidence he/it intends to present at such an evidentiary hearing;

c) A written explanation of why each individual item of intended evidence referred to in (a) or (b) above (i) is not cumulative to that already introduced in prior hearings; (ii) is relevant to consideration of the January 11, 1983 amended proposed consent decree as distinct from the November 5, 1981 proposed consent decree; and (iii) was not submitted at prior hearings in this matter.

Such submission shall be in writing and shall be filed, by the dates above specified, with the office of the Clerk, United States District Court, Room 326, United States Courthouse, Superior Avenue, N.E. at Public Square, Cleveland, Ohio.

INSPECTION

For a more complete statement of the matters involved, reference may be made to the Court file of pleadings which is available for inspection 9:00 - 4:00 P.M., Mondays through Fridays, holidays excepted, at the office of the Clerk, United States District Court, Room 326, United States Courthouse, Superior Avenue, N.E. at Pub-

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO: C80-1964

JUDGE THOMAS D. LAMBROS

THE VANGUARDS OF CLEVELAND

Plaintiff,

-vs-

THE CITY OF CLEVELAND, et. al

Defendants,

and

LOCAL # 93, IAFF-AFL, CIO-CLC

Intervenor.

OBJECTIONS TO CONSENT DECREE

(Filed January 26, 1983)

Pursuant to this Honorable Court's order of January 19, 1983, Intervenors, Local # 93 of the International Association of Fire Fighters, A.F.L., C.I.O., C.L.C., hereby formally object to the approval forthwith of the Amended Consent Decree recently lodged with this court by Plaintiffs and Defendants herein.

One day following the re-election of the Mayor of the City of Cleveland, George Voinovich, at the close of business, and in rather unceremonious fashion, the original consent decree was left at the offices of Intervenors' Council. That Consent Decree, obviously was the product of bipartite and not a tripartite effort. This was

despite the fact that intervention had been allowed by Local # 93's to at least six months prior to the November election.

This Court showed obvious displeasure at the collusive actions of Plaintiffs and Defendants at the hearing of January 7, 1983. Judge Lambros made clear, extremely clear, his intention to end the obvious exclusion of Intervenors. The reason for this action by various representatives of Plaintiff and Defendant were obviously the product of certain pre-conceived notions that Local # 93 was "anti-minority".

Intervenors wish the record to clearly reflect the sincere appreciation felt for both Judge Thomas D. Lambros and Magistrate David S. Perelman. The unusual postures in this matter have required a constant vigil to keep in mind the fairness, adequacy and reasonableness of a court order which must, by its very nature cause the commission of further wrongs, increase racial disharmony raise serious questions of the quality of Fire Protection to the citizens of the City of Cleveland. This Court made quite obvious the fact that these issues would, within the law embodied herein, be taken into account and Intervenors are confident that within the proscribed limitations this objective was clearly met.

The first and after life of the initial decree was significantly decreased by negotiations. Additional officer positions were created by the Defendant herein and this was strongly urged by this court and also gained from the process of negotiation.

Counsel for the Plaintiffs from the beginning, have clearly maintained that Intervenors sole posture in this

case, was obstructionist in nature. This is shown by their objecting to Intervention, collusive actions throughout this long arduous journey and actual statement as contained in their January 1982 Trial Brief. They will never agree that the Local represents *ALL* Cleveland Firefighters. The record in this proceeding cannot be disputed and is contrary to that thinking.

Local #93 has consistently and steadfastly maintained that there must be a more equitable, more fair, more just way to correct the problems caused by the Defendants herein. Many alternatives to the hopefully soon to be unnecessary "remedial" methods embodied in the law have been explored and some have been utilized.

Local #93 reiterates it's absolute and total objection to the use of racial quotas which must by their very nature cause serious racial polarization in the Fire Service. Since this problem is obviously the concern of the collective representative of all members of the fire service, Intervenors, Local #93. We respectfully urge this court not to implement the "remedial" provisions of this Decree.

Respectfully submitted,

/s/ William L. Summers
General Counsel
Local #93 IAFF AFL-CIO-CLC
Summers, Potts, Kampinski,
Brucato, Tittle & White
1818 Standard Building
Cleveland, Ohio 44113
(216) 696-0727

SERVICE

A copy of the foregoing Objections to Consent Decree was mailed to John D. Maddox, Director of Law, Attorney for Defendants, Room 106 - City Hall, 601 Lakeside Avenue, Cleveland, Ohio 44114; and Edward R. Stege, Jr., Esq. 1800 Standard Building, Cleveland, Ohio 44113, this — day of —, 1983.

William L. Summers
General Counsel

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C 80-1964

THE VANGUARDS OF CLEVELAND, et al.,

Plaintiffs,

vs.

THE CITY OF CLEVELAND, et al.,

Defendants,

and

LOCAL NUMBER 93, I.A.F.F., AFL-CIO,

Intervenor.

LAMBROS, DISTRICT JUDGE

JUDGMENT

(Filed January 31, 1983)

In accordance with the memorandum opinion and order of this date, the January 11, 1983 proposed consent decree is hereby adopted as a fair, reasonable, and adequate settlement of the claims in this action. The objection of Local 93 is hereby overruled. Defendant City of Cleveland is hereby ordered to implement the consent decree forthwith.

This action is terminated.

IT IS SO ORDERED.

/s/ Thomas D. Lambros
United States District Judge

DATED: 1/31/83

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO: C80-1964

JUDGE THOMAS D. LAMBROS

THE VANGUARDS OF CLEVELAND,
et. al.,

Plaintiffs

—vs—

THE CITY OF CLEVELAND, et. al.

Defendants

and

LOCAL NUMBER 93, I.A.F.F.,
AFL-CIO,

Intervenor

NOTICE OF APPEAL

(Filed February 7, 1983)

Notice is hereby given that Local Number 93, I.A.F.F., AFL-CIO, Intervenor above named, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the order overruling Intervenor's objections to the Consent Decree proposed by Plaintiffs, and granting the Plaintiffs Motion to Approve the Proposed Consent Decree lodged on January 11, 1983, entered in this action on the 31st day of January, 1983.

/s/ William L. Summers
Attorney for Intervenor
Summers, Potts, Kampinski,
Brucato, Tittle & White
1818 Standard Building
Cleveland, Ohio 44113
(216) 696-0727

SERVICE

A copy of the foregoing Notice of Appeal was mailed this 7th day of February, 1983 to Edward R. Stege, Jr., Attorney for the Plaintiff, 1800 Standard Building, Cleveland, Ohio 44113.

A copy of the foregoing Notice of Appeal was mailed this 7th day of February, 1983 to John D. Maddox, Attorney for Defendants, Room 106 City Hall, 601 Lakeside Avenue, Cleveland, Ohio 44114.

/s/ William L. Summers
Attorney for Intervenor

No. 83-3091

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

VANGUARDS OF CLEVELAND, ET AL.,

Plaintiffs-Appellees,

v.

CITY OF CLEVELAND, ET AL.,

Defendants-Appellees,

and

LOCAL NUMBER 93, I.A.F.F., AFL-CIO,

Intervenor-Appellant

ORDER

(Filed April 22, 1985)

BEFORE: KENNEDY and CONTIE, Circuit Judges, and COOK* United States District Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman, Clerk

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* Hon. Julian A. Cook, Jr. sitting by designation from the Eastern District of Michigan.

No. 83-3091

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VANGUARDS OF CLEVELAND, ET AL.,

Plaintiffs-Appellees,

v.

CITY OF CLEVELAND, ET AL.,

Defendants-Appellees,

and

LOCAL NUMBER 93, I.A.F.F., AFL-CIO,

Intervenor-Appellant

ORDER

(Filed April 26, 1985)

BEFORE: KENNEDY and CONTIE, Circuit Judges, and COOK* United States District Judge

Upon consideration, it is ORDERED that the order filed in the above case on April 22, 1985 be amended to add the following paragraph:

"Judge Kennedy would grant rehearing en banc for the reasons stated in her dissent."

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman, Clerk

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* Hon. Julian A. Cook, Jr. sitting by designation from the Eastern District of Michigan.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CIVIL ACTION NO. C 80-1964

JUDGE THOMAS D. LAMBROS

THE VANGUARDS OF CLEVELAND,

Plaintiffs

vs.

THE CITY OF CLEVELAND, et al.,

Defendants

and

LOCAL #93, et al.,

Intervenors

STIPULATIONS OF FACT

It is hereby stipulated between the parties as follows:

1. Percentage of minorities in City of Cleveland:

	Black	Hispanic	Total
1930	8.0	?	8.0% +
1940	9.6	?	9.6% +
1950	11.0	?	11.0% +
1960	28.6	?	28.6% +
1970	38.3	?	38.3% +
1980	43.8	3.1	46.9%

2. Percentage of minorities in Fire Department:

1966	3.5%
1981	14.2%

3. Number of persons on payroll in all ranks in Fire Department:

Year	Number
1950	1,200
1960	1,279
1970	1,278
1980	829

4. Breakdown in Division of Fire as of December 31, 1981:

	Total	Minorities	%
Firefighters	772	131	
Lieutenants	139	4	
Captains	69	4	
Battalion Chiefs	21	2	
Assistant Chiefs	2	0	
*Chiefs	1	0	
Totals	995	141	14.2%

* An Assistant Chief has been appointed Acting Chief

5. Breakdown in Firefighter grade as of December 3, 1981:

	Total	Minorities
Firefighter First Grade	534	52
Firefighter Second Grade	0	0
Firefighter Third Grade	148	49
Firefighter Fourth Grade	90	30*
Totals	772	131

* One minority firefighter fourth Grade is presently on leave of absence.

6. Ranks of Lieutenant and above as of December 31, 1981:

a. Whites 213
Minorities 10 % minority—4.5%
Total 223

b. Of 854 whites in the Division of Fire as of December 31, 1981, 213 or 24.9% held the ranks of Lieutenant and above.

c. Of 141 minorities in the Division of Fire as of December 31, 1981, 10 or 7.1% held the ranks of Lieutenant and above.

7. Longevity of those minorities occupying the ranks of Lieutenant and above as of December 31, 1981:

a. The years of service on the Department and names of the minorities who are now in the ranks of Lieutenant and above:

Name	Rank	Years of Service
John Bergeon	Battalion Chief	28
Andrew Mitchell	Battalion Chief	24
Eugene Guyton	Captain	29
William Green	Captain	31
Clyde Huff	Captain	28
Donald Childers	Captain	20
James McCargo	Lieutenant	31
Kenneth Wade	Lieutenant	31
Sant Lovett	Lieutenant	17
Sterling Hill	Lieutenant	31

b. Number of years one needs before (1) early retirement and (2) full retirement:

(1) Early retirement — 25 years of service; 48 years of age

(2) Full retirement — 33 years of service; 52 years of age

8. Authorized strength in Division of Fire as compared to number of personnel as of December 31, 1981:

	Authorized	Actual	Difference	Maximum Promotions Available*
Lieutenants	173	139	34	66
Captains	78	60	18	32
Battalion Chiefs	32	21	11	14
Assistant Chiefs	6	3	3	3
Chiefs **	1	0	1	1

* Includes the openings that result in a rink by reason of protions from that rank to the next higher rank.

** One Assistant Chief of Fire has been appointed "Acting Chief of Fire".

APPROVED:

Edward R. Stege, Jr.
Stege, Delbaum & Hickman Co., L.P.A.

1800 Standard Building
Cleveland, Ohio 44113

Attorney for Plaintiffs

John D. Madison
Assistant Director of Law
City of Cleveland
Cleveland, Ohio

Attorney for Defendants

William L. Summers
Suite 1040
Standard Building
Cleveland, Ohio 44113

Attorney for Intervenors

JOINT EXHIBIT NO. 1,
PROPOSED ALTERNATIVE OF
LOCAL #93

PROPOSED ALTERNATIVE OF LOCAL #93
TO IMPOSITION OF QUOTA
SYSTEM THROUGH CONSENT DECREE

RE: THE VANGUARDS OF CLEVELAND -VS-
THE CITY OF CLEVELAND, et al.,
AND LOCAL #93, et al.

CASE NO. C-80-1964

BEFORE THE HONORABLE JUDGE
THOMAS D. LAMBROS
SUBMITTED BY COUNSEL FOR INTERVENOR

DATED FEBRUARY 15th, 1982

PROPOSED ALTERNATIVE OF LOCAL #93
TO IMPOSITION OF QUOTA
SYSTEM THROUGH CONSENT DECREE

I. PREFACE

In response to the requests of Plaintiff Vanguards and Defendant City of Cleveland Intervenor Local #93 submits the following objections, accompanied by underlying rationale, to the consent decree proposed in Case Number C80-1964 before the Honorable Judge Thomas Lambros. In addition this document sets forth what Local #93 believes to be a viable alternative to the quota system proposed by the original parties and to which Local #93 objects.

Discrimination within the Cleveland Fire Department was previously litigated in the case *of Headen v. City of Cleveland*, which case resulted in the establishment of a quota system for the hiring of new recruits. Vanguards and the City assume the position that the *Headen* program

has failed to rectify the past and present effects of discrimination. Local #93 submits as its fundamental premise that the implementation of the program proposed and outlined herein given sufficient time to take effect in conjunction with minority hiring, will achieve the result desired by the original parties without the coereive effects and disadvantages of an escalating use of quotas.

Since *Headen* was decided, the actual number of minority fire fighters has vastly increased. Given the normal course of events over the years to come, it follows that the Cleveland Fire Department will reflect the racial balance that the Plaintiffs seek without further help from the Courts. The Plaintiff's proposed system merely seeks to achieve this end in very short order, at an accelerated and unnatural pace. Local #93 feels that the same end may be reached through means less offensive and more genuinely therapeutic than that proposed. Even the most liberal members of society find the mere mention of quota systems repulsive. The imposition of quotas should be avoided if at all possible.

Further, a quota system will serve to operate unjustly to the detriment of a vast number of non-minority Fire Fighters, punishing them for alleged past discriminatory practices for which they were not responsible. If there was in fact discrimination in past promotional practices, it is the City of Cleveland which created it and must be held accountable, not Local #93. Under the consent decree proposed by the original parties, the City will not be visited by its misdeeds, but rather, the burden will be borne by individuals within the Fire Department who aspire to advance within their department careers.

With the foregoing premises in mind, Local #93 presents the following outline of developmental programs to be implemented by the City of Cleveland with the unqualified support and cooperation of the membership of Local #93, which are designed and should serve to achieve the purposes of the Plaintiffs, and all Fire Fighters as well, in obtaining the most well-rounded, well-educated, fully proficient fire fighting force employable by the City of Cleveland.

II. HISTORY OF TRAINING OF FIRE FIGHTERS FOR PROMOTIONAL EXAMINATIONS TO RANKS OF LIEUTENANT, CAPTAIN, BATTALION CHIEF, ASSISTANT CHIEF AND CHIEF OF THE DEPARTMENT.

It has been the practice and tradition of the Fire Service of Cleveland to train it's members in the Standard Operating Procedures of the Department and accepted techniques of Prevention and Fire Suppression used in the Cleveland Fire Department. This has been accomplished by both formal and informal methods. The formal method is the use of on-duty non-fire fighting time for in-service training. The on-duty time is used for house drills on various practices and for duly scheduled training sessions at the Fire Training Academy. (See attached schedules and drills).

The informal method is the guidance that experienced Fire Fighters give to their contemporaries on a day-to-day, fire-to-fire, emergency-to-emergency basis. This informal method, although unstructured in nature, is equally valuable to the structured formal, in-service, training. It is here that the older experienced Fire Fighter relates the confidence that comes from conquering fear in life and

death situations. It is here that the young, eager to learn and self-improve Fire Fighter has the opportunity to listen, discuss, understand, and assimilate the training and experience of those who have proven themselves.

Further, in 1980, the Union and the City of Cleveland entered into a joint apprenticeship program through the I.A.F.F. This program seeks to train all Fire Fighters equally and thoroughly through assignment and work changes over the first three and one half years of their employment by the city.

III. PROPOSAL FOR THE IMPROVEMENT OF TRAINING OF FIRE TRAINING OF FIRE FIGHTERS FOR PROMOTIONAL EXAMINATIONS TO RANKS OF LIEUTENANT, CAPTAIN, BATTALION CHIEF, ASSISTANT CHIEF AND CHIEF OF THE DEPARTMENT WITHOUT RACIAL PREFERENCES.

Having summarized and suggested the value of historical training practices and traditions within the Fire Service of Cleveland, Local #93 now submits that the time is ripe to implement well-conceived, progressive changes to insure the continued responsiveness of the Service to its avowed purpose, while advancing the cause of equal and just treatment of all Fire Fighters regardless of race, color, creed, or level of rank. At the heart of the Intervenor's design is the concept of regimenting those historical fire training practices and traditions which are not already systematically organized.

A. CHANGE #1

Local #93 proposes that the administration of the City of Cleveland proceed forthwith to expand and monitor the formal training of its Fire

Fighters. The City shall legislate an ordinance providing that all reference material for upcoming promotional examinations be announced immediately following the establishment of an eligibility list from the last examination. Alternatively, the Court should order the Civil Service to so act, pursuant to the Union's request it had previously denied. (See attachment).

Expansion of formal training shall include the designation of Monitors who shall organize, schedule, and execute formal review sessions at which specified portions of announced exam reference material will be treated in depth and with the attention deserved, advancing in increments to cover the maximum amount of material possible before the next exam.

B. CHANGE #2

Expansion of formal training shall also include the formalization of previously informal rap sessions concerning the realities of fires and emergencies, through the utilization of videotaped department reports. Local television stations shall be solicited to cooperate in providing videotapes from their active files and archives. The Fire Training Academy shall be similarly approached, and its videotape equipment, including cameras, shall hereon be used in an active and progressive manner to film fires, emergencies, and fire and emergency training sessions.

Videotapes as well as films are also available from the N.F.P.U., National Fire Academy, Ohio State Fire Academy, and the I.A.F.F. Enhancement of the full training of Fire Fighters can be anticipated from taking full advantage of these available videotape communication resources. These formalized rap sessions can be expected to generate greater interest, debate, retained learning and comradery.

C. CHANGE #3

In furtherance of the expansion of formal training the City shall agree to bear the cost of any course in Fire Technology which an employee has successfully completed, with a "C" average or better.

Similarly, and as an amplification of this approach, which is utilized extensively in the private sector, the City shall bear the cost of any course in Labor-Management relations which an employee has successfully completed, with a "C" average or better. Courses in Labor-Management relations prepare prospective promotees for the demands and challenges of leadership roles.

Courses in Fire Technology and Labor-Management relations are variously available at Cuyahoga Community College, Lakeland Community College, and extension courses and formal curriculum at the major universities in the Greater Cleveland area.

The City may deem it advisable to prepare and publish a listing of courses and colleges the City considers appropriate to the purposes of Change #3. Such a listing shall not be considered exclusive of other courses in the subjects denoted, which arguably serve the purposes of Change #3, and consent to employees to enroll in such courses under the terms of this Change shall not unreasonably be withheld.

D. CHANGE #4

The apprenticeship program, mentioned in passing in the History section, came into effect late in 1980 and has a 3 1/2 year duration. Hence, it may be considered a change, the effect of which, in conjunction with the effects of continued quotas at the hiring level, should be taken into account before the use of quotas in the Fire Department is escalated.

The six-man Joint Apprenticeship Training Committee appraised the "Fire Medic" program and recommended its adoption to the City. Accordingly, the Fire Medic program, a joint development of the International Association of Fire Fighters and the International Association of Fire Chiefs, was mutually adopted by Local #93 and the City of Cleveland.

The program combines Fire Fighting theory and tactics with emergency medical technician skills. The apprentice is thereby subjected to an all-around educational program which helps construct a sound foundation upon which to build his career. Successful completion of the Fire Medic Program helps to maximize the individual promotional applicant's success potential in a racially neutral manner, subject only to that individual's incentive and actual capabilities.

See attached Section XXVI Work Experience Schedule.

E. CHANGE #5

The City shall, in conformity with the purposes and intent underlying Change #1, schedule and hold promotional examination every two years without fail. The City shall employ only qualified professionals and professional firms in this endeavor and the tests shall be updated as appropriate and verified each time.

IV. CONCLUSION

Local #93 wholeheartedly endorses the purpose of providing applicants for promotion equal opportunities to succeed under testing procedures which are racially neutral. The Union submits that the hereinabove outlined proposal with its five designated changes is consonant with that purpose. It seeks to educate all applicants, providing an opportunity of which each may choose or decline

to take advantage. It is distinctly superior to quotas in that it will preserve the all-important incentive of all Fire Fighters as individuals, whether black, white, red, or yellow, to persevere and, through hard work and determination, to excel above their peers. It will permit advancement through promotional ranks on the basis of merit alone, avoiding the coercive effect of racial preferences imposed on all and acting to the unjust detriment of innocent non-minority Fire Fighters. This proposal will permit the effect of quotas at the hiring level, which have already been felt, to lead the system to its natural equilibrium.

Finally, this proposal will guarantee that the Citizens of Cleveland receive the very best Fire Fighting Force possible, that to which they are indisputably entitled. It should be given due respect and serious consideration.

Respectfully submitted,

/s/ Blaise A. Brucato
Attorney for Intervenor
Summers, Potts, Kampinski & Brucato
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SECTION XXVI

Work Experience Schedule

The training of apprentices shall include the following work experience schedule: (Sample)

RECRUIT TRAINING SCHOOL	**2- 4 Months**
Orientation	
Breathing Apparatus	

Protective Clothing	
Safety	
Tools and Appliances	
Handling Hose	
Directing Fire Streams	
Handling and Climbing Ladders	
Forcible Entry	
Standard Operating Procedures of Pumper Companies	
Standard Operating Procedures of Ladder Companies	
Fire Prevention Inspection	
Search and Rescue Procedures	
Emergency Medical Care	
Ventilation	
Live-fire Experience	
TRUCK AND ELEVATED PLATFORM COMPANY	**6-12 Months**
Standard Operating Procedures	
Ventilation	
Salvage	
Search and Rescue	
Emergency Care	
Forcible Entry	
Watch Duty	
Response Rules	
Equipment and Apparatus	
Drive and Operate	
ENGINE AND PUMPER COMPANY	**9-18 Months**
Standard Operating Procedures	
Exposure Protection	
Extinguishment	
Emergency Care	
Watch Duty	
Response Rules	
Hose, Tools, and Appliances	
Pumping	
Drive and Operate	

MEDICAL EMERGENCY RESPONSE VEHICLE*	**9-15 Months**
Standard Operating Procedures	
Search and Rescue	
Extrication	
Pre-hospital Emergency Care	
Extrication Equipment	
E.M.S. Equipment	
Response Rules on Procedures	
Safety	
Triage	
Disaster Plans and Procedures	
Drive and Operate	
FIRE PREVENTION BUREAU	**1- 6 Months**
Code Enforcement	
Fire Investigation	
Arson Detection (Awareness)	
Public Education	
Fire Prevention Inspection	
OTHER BUREAUS	**1- 3 Months**
Apparatus Maintenance Shop	
Communications	
Fire Department Headquarters	
Training	

***Medical Emergency Response Vehicle is any unit that is assigned a primary responsibility of providing Pre-hospital Emergency Care and is appropriately equipped to provide basic life support, basic-level pre-hospital emergency care, and extrication (i.e. Light or Heavy Duty Rescue Squads, Pumpers, Ladder Trucks, Utility Vehicles, Ambulances, etc.).**

(ATTACHMENT—FIRE MEDIC PROGRAM)

Local 93's Civil Service Committee, which is a bi-racial make-up of Fire Fighters of all ranks within the Fire Service, has recommended that the city's Civil Service Commission designate the books to be used as study reference for promotional exams within a short period of time after a promotional list has been certified.

This action on the part of the Civil Service Commission would allow for the maximum length of time for all interested parties to obtain and study the required material. Further, the Civil Service Commission could have made available to the Fire Department's Training Academy, study guides which could be used by the Training Academy to conduct classes directly related to the material from which the promotional examination questions would be taken. Any interested member of the Fire Department could then, on a voluntary basis, take advantage of this study course to better be able to compete in future promotional examinations.

ATTACHMENT: UNION PROPOSAL DENIED BY CIVIL SERVICE COMMISSION

PLAINTIFF'S EXHIBIT 10

LIEUTENANT PROMOTIONS 1969, 1972, 1975

LIEUTENANT PROMOTIONS (1969, 1972, 1975)

	Blacks	Whites
Total	48	655
# Promoted	5	172
% Promoted	10.4%	26.2%

Black selection rate 39.7% that of whites.

1969 Only

Total	9	152
# Promoted	2	38
% Promoted	22.2%	25 %

Black selection rate 88.8% that of whites.

1972 Only

Total	21	207
# Promoted	0	29
% Promoted	0 %	14 %

Black selection rate 0% that of whites.

1975 Only

Total	18	296
# Promoted	3	105
% Promoted	16.6%	35.4%

Black selection rate 46.8% that of whites.

PLAINTIFF'S EXHIBIT 11

CAPTAINS PROMOTIONS 1969, 1972, 1975

CAPTAIN PROMOTIONS (1969, 1972, 1975)

	Blacks	Whites
Total	22	194
# Promoted	5	84
% Promoted	22.7%	43.2%

Black selection rate 52.5% that of whites.

1969 Only

Total	8	49
# Promoted	1	19
% Promoted	12.5%	38.7%

Black selection rate 32.2% that of whites.

1972 Only

Total	6	47
# Promoted	0	10
% Promoted	0 %	21.2%

Black selection rate 0% that of whites.

1975 Only

Total	8	98
# Promoted	4	55
% Promoted	50 %	56.1%

Black selection rate 89.1% that of whites.

PETITIONER'S

BRIEF

Supreme Court, U.S.
FILED
DEC 9 1985

No. 84-1999

In The

Supreme Court of the United States

October Term, 1984

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, C.L.C.,

Petitioner,

vs.

CITY OF CLEVELAND, *et al.*,

and

VANGUARDS OF CLEVELAND,

Respondents.

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER IN AN ACTION BROUGHT UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AGAINST A PUBLIC EMPLOYER A COURT MAY ORDER RELIEF TO MINORITIES IN THE FORM OF AFFIRMATIVE ACTION PREFERENCE IN PROMOTIONS WITHOUT PROOF THAT THEY WERE ACTUAL VICTIMS OF RACIAL DISCRIMINATION.

II. WHETHER A COURT MAY, CONSISTENT WITH PRINCIPLES OF DUE PROCESS AND EQUAL PROTECTION, ENTER A PURPORTED CONSENT JUDGMENT OVER THE OBJECTION OF AN INTERVENOR WHOSE RIGHTS AND INTERESTS ARE ADVERSELY AFFECTED BY THE OPERATION OF THE JUDGMENT.

PARTIES BEFORE THE COURT OF APPEALS

In the United States Court of Appeals for the Sixth Circuit the Appellant was Local No. 93 of the International Association of Firefighters and its members.

The Appellees were the Vanguards of Cleveland and its members and the City of Cleveland and its officers.

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No. 84-1999

In The

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LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, C.L.C.,

Petitioner,

vs.

CITY OF CLEVELAND, *et al.*,

and

VANGUARDS OF CLEVELAND,

Respondents.

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion and order of the Sixth Circuit Court of Appeals in *Vanguards of Cleveland v. City of Cleveland* is reported at 753 F.2d 479 (1985) (Pet. App. A 1-28). The judgment of the District Court was unreported (Pet. App. A 29-38).

JURISDICTION

The judgment of the Court of Appeals was entered on January 23, 1985. Petition for Rehearing with suggestion for rehearing *en banc* was denied April 22, 1985. The petition for a writ of certiorari was filed on June 21, 1985 and was granted on October 7, 1985. This Court's jurisdiction is conferred by 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

1. United States Constitution Amendment XIV:

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000(e) *et seq.*

a) §703(h), 42 U.S.C. 2000e-2(h)

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of

compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences [sic] are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

b) §706(g), 42 U.S.C. 2000e-5(g)

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated

against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

STATEMENT OF THE CASE

On October 23, 1980, the Vanguards of Cleveland (hereinafter Vanguards), an association of black and Hispanic firefighters employed by the City of Cleveland, Ohio brought a class action in the United States District Court for the Northern District of Ohio. The suit alleged that the defendant City of Cleveland had engaged in unlawful employment practices with the purpose and effect of discrimination against minorities on the basis of race and national origin in violation of the Thirteenth and Fourteenth Amendments to the United States Constitution, 42 U.S.C. 1981 and 1983 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e) *et seq.* The thrust of the complaint was that the City had intentionally discriminated against blacks and Hispanics in the hiring, assignment, and promotion of firefighters. (JA 6)

The Vanguards sought: (1) a declaratory judgment that the City had engaged in the past in discriminatory

employment practices, (2) an injunction to prohibit such practices in the future, and (3) the institution of a race-conscious or affirmative action plan for hiring and promotions. (JA 12-13)

Shortly after the filing of the complaint, the City of Cleveland and the Vanguards attempted to negotiate a settlement, *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479, 481 (6th Cir. 1985); (Pet. App. A3). During these negotiations, a motion for leave to intervene was filed on behalf of Petitioner, Local #93, International Association of Firefighters (I.A.F.F.), AFL-CIO, CLC (hereinafter referred to as Petitioner or Local 93).[1]

In their complaint, Local 93 asserted that: "[P]romotions based upon any criteria other than competence, such as racial quota system, would deny those most capable from their promotions and would deny the residents of the City of Cleveland from maintaining the best possible fire fighting force." (JA 27)

Leave to intervene was granted on June 5, 1981. (JA 5) Thereafter, settlement negotiations between the Vanguards and the City continued. Local 93 was not party to these negotiations. In fact, Local 93 was not even aware that such discussions were taking place until the City and

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[1] Local No. 93 is a chapter of the International Association of Firefighters and was established in 1918. They are a member Union of the AFL-CIO, and Canadian Labour Council and are the official collective bargaining representative of rank and file members of the Cleveland Fire Department. The membership includes both minority and non-minority individuals. (App. p. 9)

Vanguards tendered a proposed consent decree on November 5, 1981. Petitioner interposed objections to the proposed decree. (JA 60) On January 7, and 8, 1982, evidentiary hearings were held in the District Court to consider the objections. (JA 50). As a result of the hearings, the District Court urged all parties, including Local 93 to engage in "some intensive dialogue" regarding possible settlement of the case. (App. p. 1)

On February 15, 1982, Petitioner Local 93 filed a proposed alternative to the imposition of a quota system. This proposal advocated an extensive upgrading of the training program for new firefighters including professional assistance for firefighters preparing to compete for promotion in racially unbiased examinations.

It was urged that this plan, in conjunction with the already operational decree arising from the case of *Headen v. City of Cleveland*,[3] mandating quotas for the hiring of minorities in the fire department, would lead to a natural racial balance. (JA 109-116)

A second evidentiary hearing was held on April 27, 1982. Again, it appeared that no agreement between all three parties had been reached and the Court referred the matter to a magistrate for further negotiation in an effort toward settlement.

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3 *Headen v. City of Cleveland*, Case No. C73-330 (1973), United States District Court, Northern District of Ohio Eastern Division provided for hiring of new minority recruits on a stepped-up or quota basis.

During some forty (40) hours of negotiations, Petitioner actively worked with the City and the Vanguards with the goal of reaching an agreed settlement based on the current state of the law. As a result of "a high level of cooperation by all counsel" a proposed amended consent decree was agreed upon with the understanding that the proposal would be submitted for a referendum vote by the general membership of Local 93. (JA 77-78). However, this agreement was overwhelmingly rejected by 88% of the membership of Local 93. (Pet. App. A 21)

On January 11, 1983, the Vanguards and the City of Cleveland submitted an amended consent decree to the District Court which had again been negotiated by only the Vanguards and the City. (Pet. Op. A-3) Petitioner filed objections to the decree on January 26, 1983. Again, the thrust of Petitioner's strong objection was opposition to the use of racial quotas as a remedy for discriminatory practices within the Cleveland Fire Department and again realistic alternatives were proposed. (JA 96)

Under the proposed Amended Decree, promotional preference was awarded to any minority firefighter who passed the promotional examination, without any regard whatsoever as to whether that individual had been an actual victim of past discrimination. The decree was structured to operate in stages. Under the first stage, promotions were to be made on a one-to-one basis between minority and non-minority firefighters, thereby requiring the City to pair the highest ranking minority and non-minority candidates, "*until all successful minority candidates have*

hero appointee'," (JA 92)[3] (emphasis added). The secondary stage of the decree provided for subsequent certification of eligible lists on June 16, 1984 and December 16, 1985. Promotions according to "goals" are to continue through December 1987 for each rank, even if minorities must be promoted "out of eligible list rank" if necessary to achieve the goals.[4] (JA 91)

On January 31, 1983, the District Court entered judgment adopting the proposed decree as a "consent" judgment although acknowledging that Petitioner refused to consent. The Court found the decree was a fair, reasonable and adequate settlement of the lawsuit. (JA 100)

The Court further ruled that the decree would supercede any conflicting provisions of state or local law and retained exclusive jurisdiction over any party, including Petitioner, to enforce, modify, amend or terminate the decree. (Pet. App. A 27-28)

On appeal, a sharply divided panel of the United States Court of Appeals for the Sixth Circuit affirmed *Vanguards*, 753 F. 2d 479; (Pet. App. A 1-A 28).[5] The Court of Appeals found no abuse of discretion in the District Court's ruling that the decree was fair, reasonable, and adequate. *Vanguards*, 753 F.2d at 484; (Pet. App. A 10). The majority noted that it was conceded in the lower court that there had been past discrimination by the City of Cleveland in its Fire Department. Further, the Court found that non-minority firefighters would not be absolutely barred from promotion or fired under the plan. (Pet. App. A 11). The majority specifically held that *Firefighters Local Union No. 1784 v. Stotts*, — U.S. — , 104 S. Ct. 2576 (1984) had "no effect" on their decision because they viewed the decree herein as a "consent" judgment which did not totally abrogate the seniority system. *Vanguards*, 753 F.2d at 486; (Pet. App. A 13-20).

Judge Kennedy, in a dissenting opinion, viewed the instant case as involving court-ordered relief rather than a true voluntary consent decree. *Id.*, at 492; (Pet. App. A 20-21). It was her belief that under *Stotts* and Section 706(g) of Title VII, the Court was without power to impose the remedy it did since there was no finding that the beneficiaries of the relief were actual victims of racial discrimination.

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[3] The decree also provided that if there were not enough eligible minority firefighters (those with passing promotional examination scores) to accomplish the stated goals of 11 lieutenant slots, the unfilled slots would be given to non-minorities. However, upon the posting of the next eligible lists, lieutenant promotions would first go to minorities until the "shortfall" from the previous list was made up. (Pet. App. A 34).

[4] The minority promotional "goals" are set as follows: For the period following the 1984 examination: 20% assistant chief; 30% battalion chief; 30% captain; 23% lieutenant. For the period following the 1985 examination: 20% for ranks above lieutenant and 25% for rank of lieutenant. (Pet. App. A 35-36).

[5] Circuit Judge Contie delivered the opinion of the Court in which Hon. Julian A. Cook, Jr. District Judge of the Eastern Division of Michigan sitting by designation concurred. Circuit Judge Kennedy wrote a dissenting opinion.

SUMMARY OF ARGUMENT

The decree put into effect by the District Court affords relief to minority firefighters in the form of estab-

linking goals or quotas for the promotion of minorities within the Cleveland Fire Department.

The Court's Order while styled a "consent" decree, was entered over the objection of the Petitioner-Intervenor Local No. 93, an official collective bargaining representative of all Cleveland Firefighters.

Therefore, the decree herein is not the result of truly voluntary action. The true charter of the decree is borne out by the fact that the District Court proposed to retain exclusive jurisdiction to interpret and modify the decree and to enforce its provisions by contempt of Court power, if necessary. Moreover, the decree purports to supersede any State or City statute or ordinance as well as any collective bargaining agreement. Clearly then, the decree must be analyzed in terms of Court-ordered relief, and not in terms of truly voluntary action.

This court's decision in *Firefighters Local Union No. 1784 v. Stotts*, — U.S. —, 104 S. Ct. 2576 (1984) and previous decision of this Court together with the plain language of § 706(g) of Title VII make clear that make-whole relief may only be afforded to actual victims of racial discrimination. However, in the present case, relief is afforded to a class of persons whose identity at the time of judgment was unknown and without proof that any single person was an actual victim of discriminatory promotional practices within the Cleveland Fire Department. Nor was there evidence presented that the promotional system in itself had in the past operated to discriminate against minorities.

In awarding this blanket relief to non-victims, the decree deprives non-minority firefighters of their right to

due process and equal protection of the law under the Fourteenth Amendment to the United States Constitution.

By awarding superseniority to persons not shown to have been victims of discrimination at the expense of innocent non-minority firefighters, the District Court has well exceeded the authority granted by Title VII and the decree should therefore be ruled invalid.

ARGUMENT

I. A DISTRICT COURT MAY NOT ORDER AFFIRMATIVE ACTION RELIEF TO NON-VICTIMS OF RACIAL DISCRIMINATION UNDER § 706(g) OF TITLE VII.

The instant case poses squarely the question of whether a court may in fashioning relief for a Title VII violation, award affirmative equitable relief to non-victims of racial discrimination over the objection and to the detriment of innocent third parties.

Petitioner submits that in keeping with previous decisions of this Court, including *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984) the foregoing proposition must be answered in the negative.

In *Stotts*, this Court reviewed an order of a District Court enjoining the City of Memphis from laying off minority firefighters in accordance with its established seniority system. The District Court injunction in that case was apparently entered by the Court to prevent any erosion of progress that had been made under a previously entered consent decree remedying effects of Title VII vio-

lations. As a result of the injunction, some "non-minority employees with more seniority than minority employees were laid off or demoted in rank." *Id.*, at 2582. This Court rejected the Circuit Court's view that the injunction merely enforced the terms of the previous consent decree. *Id.*, at 2585-86. Following *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) and *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), this Court found that under Section 706(g) of Title VII it was improper for the District Court to award layoff protection to minorities based upon their "mere membership in a disadvantaged class." *Stotts*, 104 S. Ct. at 2588. This Court noted that the injunction involving a layoff quota was a type of relief "that could not have been ordered had the case gone to trial and the plaintiff proved that pattern or practice of discrimination existed." *Id.*, at 2588.

Since this Court's decision in *Stotts*, many Circuit Courts, as in the present case, have either given it a narrow reading or attempted to distinguish it on the facts.

In *Deveraux v. Geary*, 765 F. 2d 268 (1st Cir., 1925), the First Circuit stated: "[T]his is a difficult and sensitive area in which we and other Circuit Courts could be mistaken in our reading of the current precedent." *Id.*, at 275.

Indeed, since *Stotts*, every Court of Appeals has given it a narrow reading and in effect held that *Stotts* applies only when seniority rights are affected. *Turner v. Orr*, 759 F. 2d 817, 823-826 (11th Cir. 1985); *Deveraux v. Geary*, 765 F. 2d 268 (1st Cir., 1985); *Van Aken v. Young*, 750 F. 2d 43, 45 (6th Cir. 1984); *Wygant v. Jackson Board of Education*, 746 F. 2d 1152, 1157-58 (6th Cir. 1984), cert. granted No. 84-1340; *EEOC v. Local 638*, 753 F. 2d 1172, 1186 (2nd Circuit, 1985), pet. cert. pending No. 84-1656; *Diaz v. AT & T*, 752 F. 2d 1356, 1360 N.5 (9th Cir. 1985); *Kromnick v. School District*, 739 F. 2d 894 (3rd Cir., 1984), cert. denied, No. 84-606.

In the instant case, the lower Court majority found *Stotts* not controlling in two regards. *First*, they viewed the decree as involving purely voluntary action and held that *Stotts* does not apply to consent decrees. *Vanguards*, 753 F. 2d at 485-9; (Pet. App. A 13-20). *Secondly*, the majority held that *Stotts* applies only where seniority rights or a bona fide seniority system are abrogated. *Id.*, at 485; (Pet. App. A 13).

Petitioner submits that the lower Court has not only inappropriately viewed the instant case as involving voluntary action, but it has also misinterpreted this Court's decision in *Stotts*.

The majority below was quick to categorize the instant case as involving voluntary action, thereby in their view removing it from the pale of *Stotts*. "The fact that this case involves a consent decree and not an injunction makes the legal basis of the *Stotts* decision inapplicable." *Vanguards*, 735 F. 2d at 486; (Pet. App. A 14). Having thus categorized the case as involving a "consent" decree, the Court went on to reason that the provision found in Section 706(g) of Title VII[6] limiting a Court's power to

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[6] Section 706(g) of Title VII is codified as 42 U.S.C. § 2000(e)-5(g) and reads as follows:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may

(Continued on following page)

true coercive order of Court is to ignore the facts underlying the entry of decree as well as the legal consequences of the order. As noted previously, the Firefighters Union as the recognized collective bargaining representative was granted leave to intervene in this action. (JA 24-25) After their intervention, the District Court strongly urged that they take part in all negotiations toward settlement. (JA 57-58)

Nonetheless, over the continual and strenuous objections of the Petitioner[9] the decree was adopted as an order of the District Court while noting that the Petitioner did not in fact consent. (Pet. App. A 30-31)

Aside from the factual aspects, the majority's characterization of the decree as a voluntary action belies the legal consequences of the District Court Order which remove it from the realm of truly voluntary actions of the kind found in *Weber*. While a consent decree does contain some contractual aspects; *see e.g. United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236 N.10 (1975), it has legal consequences that go far beyond those of a mere contract. In *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932), the Court stated: "We reject the argument for the intervenors that a decree entered upon consent is to be treated as a contract and not as a judicial act." The very terms of the Court's order herein reveal its true nature. As Judge Kennedy dissenting below noted,

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[9] Petitioner as intervenor in the lower Court posed objections to the initial proposed decree, (JA 60), overwhelmingly rejected the amended proposed decree by vote of Union members (Pet. App. A 31) and filed objections to the final amended decree. (JA 96)

enter "coercive" remedial orders did not apply. The majority below, again relying on their categorization of this case as involving voluntary action, stated that *Stotts* must be read in light of *United Steelworkers v. Weber*, 443 U.S. 193 (1979). *Weber* held that an employer may voluntarily adopt a reasonable affirmative action or race-conscious plan to remedy effects of past discrimination, even if such plan overrides seniority rights of other non-minority employees. Indeed, the majority of the Sixth Circuit went so far as to state that if the order in the instant case were impermissible under *Stotts*, then *Stotts* must have *sub silentio* overruled *Weber*. *Vanguards*, 753 F. 2d at 488; (Pet. App. A 17).

Petitioner submits that to categorize the instant case as involving voluntary employer action as opposed to a

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(Continued from previous page)

enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

the decree on its face states: "IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED." *Vanguards*, 753 F.2d at 492; (Pet. App. A 26). Moreover, the decree makes non compliance subject to contempt of Court and the Court retains jurisdiction to interpret and modify the decree (Pet. App. A 28). Perhaps most significantly, the decree purports to supersede or control over any State constitutional or statutory provisions as well as any City charter provision, ordinance, collective bargaining agreement, or administrative rule. (Pet. App. A 37)[9]

Even the Circuit that decided the instant case has previously recognized although a consent decree may be entered into voluntarily, it must still be analyzed in terms of an order of Court. "A consent decree, however, is also a final judicial order." *Williams v. Vukovich*, 720 F. 2d 909, 920 (6th Cir. 1983).

Clearly, the decree in the instant case involves "consent" in name only.

In light of the foregoing, it is clear that the present case must be analyzed in terms of principles applicable

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[9] It is significant to note that the Ohio Public Employees collective bargaining statute, Ohio Revised Code § 4117.01-23 (effective April 1, 1984 after the entry of the decree herein) makes voluntary changes in a city's promotional policy subject to the collective bargaining process. Under a decree as in the instant case, a city's obligation under the Statute might be avoided O.R.C. 4117.08 provides:

> 4117.08 Subjects of bargaining exclusions
>
> (A) All matters pertaining to wages, hours, or terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement are subject to collective bargaining between the public employer and the exclusive representative, except as otherwise specified in this section.

to court-ordered relief. The focus then turns to whether the lower court exceeded its power or authority in entering the decree herein.

Petitioner submits that the lower court exceeded its authority because it put into order a remedy it would have been powerless to order under Title VII, had the matter actually gone to trial. The decree herein not only provides relief to minorities without any proof that they were actual victims of discrimination, but it unnecessarily trammels the rights of innocent non-minority individuals.

In *System Federation No. 91 v. Wright*, 364 U.S. 642, (1961), this court made clear that a Court's authority to adopt a consent decree is indeed limited: "[T]he district court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce." *Id.*, at 651.

In *System Federation*, the employer railroad and several unions had entered into a consent decree under the Railway Labor Act prohibiting discrimination against non-union employees. When the Act was later amended to permit union shops, a union moved for modification of the decree to reflect the amendment. The lower courts refused to enter the modification based on the reasoning that non-union shops were still legal and the decree could be enforced. In reversing the lower court, this Court stated that refusal to modify the decree "would render protection in no way authorized by the needs of safeguarding statutory rights." *Id.*, at 648. Most pertinent to the issue in the instant case, this court noted the district court could not merely rely on the parties agreement in adopting a decree. "[I]t was the Railway Labor Act, and only incidentally the parties that the District Court

served in entering the consent decree now before us. * * * The parties have no power to require of the court continuing enforcement of rights the statute no longer gives." *Id.*, at 451-452.

While not squarely presented with the question, this Court in *Stotts* reaffirmed the *System Federation* principle. As Judge Kennedy noted in her dissent below: "The Court did, however, use the proposition that a consent decree is so limited as a necessary postulate from which the Court reached its holding that modification of a decree over an objection is so limited." *Vanguards*, 753 F. 2d at 491; (Pet. App. A 25).

In his concurring opinion in *Stotts*, Mr. Justice Stevens stated: "The Court seems to suggest that a consent decree cannot authorize anything that would not constitute permissible relief under Title VII." *Stotts*, 104 S. Ct. at 2594, N. 3.

As Judge Kennedy noted below, "That five Justices nonetheless joined the opinion of the Court, despite knowing of this interpretation of their opinion, indicates that the Court meant what it said." *Vanguards*, 753 F. 2d at 479; (Pet. App. A 25).

Petitioner believes that this Court did mean what it said in both *System Federation* and *Stotts* and that a Court in providing relief under Title VII is necessarily limited by the terms of that Statute. This is true whether the relief takes the form of an order, injunction, truly voluntary consent decree and particularly, a disputed decree as in the present case.

Section 706(g) authorizes a Court ". . . to provide make whole relief only to those who have been *actual victims of illegal discrimination* . . ." *Stotts*, 104 S. Ct. at 2589. (Emphasis added.)

This reasoning is consistent with previous decisions of this Court and the legislative history of Title VII. *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), defined the scope of permissible remedies as limited to make-whole relief for "actual victims of racial discrimination." *Id.*, at 772.

The decree in the present case by its very terms awards relief to individuals without any proof or finding that they were actual victims of discrimination. Paragraph Three (3) defines the disadvantaged class to include, ". . . [a]ll Blacks and Hispanics who in the future will be employed as firefighters by the Division of Fire." (Pet. App. A 32-33). Such a definition of the class on *future* upon whom the decree awards preferential treatment certainly in no way contemplates that the person demonstrate they were an actual victim of discrimination. This, together with Circuit Judge Kennedy's observation that many of the minority firefighters affected by the decree had never been eligible for promotion and therefore logically could not have been victims of past discrimination, *Vanguards*, 753 F. 2d at 490; (Pet. App. A 23)[9] point out the fact that there was not an individualized finding in the lower court of any efforts of discrimination.

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[9] It should be noted that proceedings in the lower Court brought forth several non-discriminatory factors which had effect upon the promotion of all firefighters. These included fiscal constraints, litigation and failure of the City to hold promotional examinations. (App. pp. 8-10)

It is significant to note that another panel of the Sixth Circuit Court of Appeals in a case decided subsequent to the instant case interpreted *Stotts* as requiring an individualized showing that individuals were actual victims of discrimination. In *Goodee, et al. v. Illinois Central Gulf Railroad and Brotherhood Railway Carmen of the U.S. and Canada, AFL-CIO, et al*, No. 84-5620 (6th Cir. Sept. 3, 1985) the Court stated:

> "In *Stotts*, the Court ruled that a court may not disregard a *bona fide* seniority system by ordering retroactive seniority even though adherence to the system would frustrate the attainment of racially-based hiring and promotion percentage goals contained in a consent decree. The Court specifically held that Title VII protects *bona fide* seniority systems against assault in a pattern and practice suit. The Court noted, however, that rightful place seniority may be awarded upon a showing that *specific* individuals were actual victims of discrimination." *Id.*, at 2508.
>
> "Evidence of actual discrimination existed in this case as to each of the five plaintiffs." (slip opin. p. 3) (App. pp. 2-7)

In the instant case, the lower court required no such evidence.

Had this matter been fully litigated at trial, the lower Court would have been powerless under § 706(g) to order the wide-ranging relief it did. To uphold the decree in the instant case "would be to render protection in no way authorized by the needs of safeguarding statutory rights." *Nastrom Federation*, 364 U.S. at 648, and would violate the letter and spirit of Title VII.

II. A DISTRICT COURT VIOLATES THE RIGHTS OF INNOCENT NON-MINORITY EMPLOYEES WHEN IT AWARDS AFFIRMATIVE ACTION RELIEF TO MINORITIES WITHOUT PROOF THAT THEY WERE ACTUAL VICTIMS OF DISCRIMINATION.

Having determined the impropriety of awarding relief to non-victims under § 706(g), the analysis must be taken a step further to determine the effect of such blanket relief upon the rights of innocent non-minority firefighters.

In *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), this Court determined that the ends of equity require that an innocent party must necessarily be burdened in order to make whole the actual victim of discrimination, *Id.*, at 776-779.

However, Petitioner submits that when relief is afforded to individuals without proof that they were actual victims of discrimination at the expense of innocent non-minorities, the Fourteenth Amendment as well as the ends of equity require that such relief be invalidated.

When a remedy touches "upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear . . . is precisely tailored to serve a compelling governmental interest. The Constitution guarantees that right to every person regardless of his background." *Regents of the University of California v. Bakke*, 438 U.S. 265, 299 (1978).

Following *Franks*, this Court in *Teamsters v. United States*, 431 U.S. 324 (1977), carefully detailed how a court

determines whether a particular claimant for relief is an "actual victim" of the alleged discriminatory practice in question. In so doing, the Court again made clear that a party must do more than merely be a member of a disadvantaged class. Each individual must show some personal impact as a result of discriminatory practice. The Court specifically directed that on remand the District Court was to "make a substantial number of individual determinations in deciding which of the minority employees were actually victims of the company's discriminatory practices. *Id.*, at 371-372.[20]

In discussing the operation of Title VII, this Court has noted that: "The state's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class." *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 708 (1978).

Finally, the congressional debates surrounding the passage of Title VII indicate an intended limit on a Court's remedial powers. In *Stotts*, this Court cited remarks of Senator Humphrey, one of the co-managers of the bill as follows:

[20] On remand the District Court in Teamsters was required to make individual determinations as to which employees were actual victims of the company's discriminatory practices (431 U.S. 371-372). This class was to include those persons who either (a) applied for employment and were rejected on a racially discriminatory basis, or, (b) those who were dissuaded from applying for employment because of the company's discriminatory practices. *Id.* at 364-371.

> "No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of Section 707(e) [enacted with out relevant change as § 706(g)]. . . . Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require . . . firing . . . of employees in order to meet a racial 'quota' or to achieve a certain racial balance. That bogeyman has been brought up a dozen times; but is non-existent." 110 Cong.Rec. 6549 (remarks of Sen. Humphrey). *Stotts*, 104 S. Ct. at 2589.

Therefore, Petitioner Local 93 submits reading *Stotts* as reaffirming the principle that a court may order relief under Title VII only to actual individual victims is consistent with previous decisions of this court and the intent behind the Act. However, as noted previously, several Courts of Appeals, including the Court below, have limited *Stotts* to situations where seniority rights are abrogated. See, *Turner v. Orr*, 759 F.2d 817, 824 (11th Cir. 1985); *Kromnick v. School District*, 739 F.2d 894, 911 (3th Cir. 1984). Such a confined and narrow reading results from a misapprehension of the *Stotts* majority's discussion of Section 703(h).[21] Clearly, Section 703(h) is not a re-

[21] Section 703(h) is codified as 42 U.S.C. § 2000e-2(h) and provides:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, pro-

(Continued on following page)

medial provision. It merely defines what is and is not an unlawful employment practice under the Act. In *Fremis*, this Court in analyzing § 703(h) stated "[I]t is apparent that the thrust of this section is directed toward defining what is and what is not an illegal discriminatory practice ..." 434 U.S. at 761.

The majority below distinguished *Stotts* from the present case on grounds that "The consent decree in this case, unlike the injunction in *Stotts*, plainly does not interfere with any seniority rights." *Vanguards*, 753 F.2d 486. (Pet. App. A 13) Clearly, even if such a distinction were determinative to the application of *Stotts*, which Petitioner submits it is not, under the facts of this case it is readily apparent that the decree *does* significantly interfere with seniority rights. Judge Kennedy correctly pointed out below that: "The consent decree in this case in effect gives minority firefighters superseniority over all non-minority firefighters for promotion purposes, at least until certain quotas are reached." *Vanguards*, 753 at 490. (Pet. App. A 22) It should also be noted that the effect on seniority

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> relief that such differences [sic] are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

does not stop with the mere promotion. A promotion in rank necessarily brings with it an array of preferential monetary, and on the job benefits pursuant to the collective bargaining agreement. Therefore, a minority passing over a non-minority for promotion by operation of the decree reaps the benefit of his "superseniority" in future promotions, vacations, holidays, shift selection, transfers, overtime, order of layoff and ultimately, pension benefits.

The majority below seemed to take comfort in the fact that Paragraph Five (5) of the decree mandates that "Seniority points will continue to be used as a criteria for promotion ..." (Pet. App. A 33) This fact, however, does not balance out or ameliorate the effects of the decree upon seniority rights and the promotional system since they are but a minor factor considered in conjunction with promotional examinations scores. The operation of the decree itself directs seniority points of any significance, except, perhaps, as to the ranking of non-minority candidates for promotion. For example, Section Nine (9) of the decree (Pet. App. A 34) provides for promotion to the rank of lieutenant on a one-to-one basis between minorities and non-minorities. This in effect creates two lists for promotion. If a non-minority candidate receives additional points on his examination score, it may move him up on the ranking of non-minorities. However, because promotion is on a one-to-one basis with the non-minority, the seniority points are of no value whatsoever. Therefore, it is little solace to the non-minority firefighter that seniority points are still used under the decree since regardless of his total score, he is still passed over for promotion by the next availability minority.

It is readily apparent that an employer in response to a Title VII may be motivated to bargain away other employee's litigation rights, career objectives, job status, and indeed their jobs in order to avoid costly litigation or for other political and financial reasons.[12]

In the present case, the City has done just that. By the terms of the decree, non-minority firefighters with higher promotional examination scores are necessarily passed over for promotion in favor of minorities (Decree Paragraphs 7 through 11, Pet. App. A 33-35), a clear derogation of the merit promotion system in place prior to the entry of the decree, a system which has never been shown to be in itself discriminatory in operation. Most significantly, the decree purports to waive the non-minority firefighters right to collaterally attack or challenge the decree. (Decree Para. 24, Pet. App. A 38)

A recent decision of the District Court which the decree herein arose makes clear the dilemma of a non-minority firefighter seeking to challenge the decree. In *Donovan, et al. v. Vanguards of Cleveland, et al. and City of Cleveland, et al.*, No. C80-1964, United States District Court No. District of Ohio, Eastern Division (pending), several non-minority firefighters sought issuance of a writ of mandamus from the District Court directing the City of Cleveland to effectuate their immediate promotion. The Petition alleged that the City had denied them due process of law and their rightful promotion to the positions of Captain and

[12] Indeed, in the decree itself the District Court found: "WHEREAS, the plaintiff and the defendants are desirous of avoiding extended and costly litigation relating to the Cleveland Division of Fire;" (Pet. App. A 30.

Lieutenant by temporarily decreasing staffing levels in those positions. The suit alleged that this was purposely done by the City in an effort to delay promotions until such time as there were minorities available. (App. pp. 12-13) The District Court deferred consideration pending the decision of this Court thereby effectively denying them any feasible avenue of relief. (App. pp. 16-17)

The foregoing case illustrates how operation of the decree herein has resulted in at least a *prima facie* case of actual discrimination against non-minorities.

Perhaps it was just these concerns for the rights of innocent third parties which led the District Court during the pendency of this case to opine "whether or not a consent decree shoved down someone's throat is counterproductive to the goal we seek to achieve." (App. p. 1)

Certainly similar concerns are behind the limitation on Court-ordered relief found in § 706(g) providing a "shield" to non-minorities against unauthorized remedies such as in this case. *Vanguards*, 753 F.2d 479, 483. (Pet. App. A 28)

In the present case, Local 93 of the International Association of Firefighters would not have had the opportunity to play any part whatsoever in the negotiation of the decree herein had they not been allowed intervention. Even so, the so called "consent" decree was entered over their strenuous objections and proposed alternatives.

Petitioner contends that where legitimate rights and interests of third parties are at stake, their position must be carefully weighed in the balance along with those of the employer and the alleged discriminatees. It is the re-

sponsibility of the Courts to insure their rights are not unnecessarily and unlawfully forfeited. This is particularly true in a case such as the present where there was no finding that those negotiating for settlement as discriminatees were actual victims.

In the present case, the employer has in effect unilaterally bargained away employment opportunities of non-minority employees which are part of a collective bargaining agreement, as well as their right to collaterally attack the decree.

This Court has in the past been ever vigilent of the rights of innocent third party employees and has condemned procedures affecting their rights without their participation or consideration.

> "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. (citations omitted) * * * * If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words." *Truax v. Raich*, 239 U.S. 33, 41 (1915)

These were the words of the Supreme Court in considering the rights of a native Austrian whose employment had been terminated under an Arizona statute subjecting employers to criminal liability should they exceed a specified limit of aliens on their workforce. There, as here, an innocent party's Fourteenth Amendment rights were compromised in favor of an impermissible remedy.

In *Stotts*, Justice O'Connor, concurring, stated: "Even when its remedial powers are properly invoked a district

court may award preferential treatment only after carefully balancing the competing interests of discriminatees, innocent employees, and the employer." (104 S. Ct. at 2582)

In *W.R. Grace Co. v. Rubber Workers*, 461 U.S. 757 (1983), this Court candidly acknowledged that an employer may well have motivation unrelated to Title VII in settling suits of this nature. "Although the ability to abrogate unilaterally, the provisions of a collective bargaining agreement might encourage an employer to conciliate with the Commission, the employers added incentive to conciliate would be paid for with the union's contractual rights." at 771.

In the instant case, while Local 93 was granted intervention, it does not appear that there was even the slightest balancing of their interests in the decree. Only brief mention is made by the Court that the Intervenors objected. (Pet. App. A 20-21)

This court's holdings in *Teamsters v. United States*, 431 U.S. 324 (1977) and *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982) solidify the proposition that the effects of a conciliatory agreement upon innocent non-minorities must be considered and equity is not served where, based upon mere membership in a class, a minority employee may enjoy superseniority over the non-minority.

In *Ford Motor Co.*, the Court invalidated the lower Court award of backpay to claimants who had alleged, but were not adjudicated to have been unlawfully discriminated against. There the Court focused on the effect upon the rights of innocent employees:

"The lower court's rule places a particularly onerous burden on the innocent employees of an employer charged with discrimination. Under the court's rule, an employer may cap backpay liability only by forcing his incumbent employees to yield seniority to a person who has not proven, and may never prove, unlawful discrimination . . .

The sacrifice demanded by the lower court's rule, moreover, leaves the displaced workers without any remedy against claimants who fail to establish their claims. If, for example, layoffs occur, while the Title VII suit is pending, an employer may have to furlough an innocent worker indefinitely while retaining a claimant who was given retroactive seniority. If the claimant subsequently fails to prove unlawful discrimination, the worker unfairly relegated to the unemployment lines have no redress for the wrong done him. We do not believe that 'the large objectives' of Title VII, *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975) (citation omitted), require innocent employees to carry such a heavy burden [430 U.S. at 228-29]

In the present case, there was not the weighing of competing interests that equity and due process demand. The lower Court made no ruling on the lawfulness of the portions of the decree abrogating seniority rights under the collective bargaining agreement. Nor did it seek to establish the identities of particular victims and specify what effect, if any, past racial discrimination within the Cleveland Fire Department had upon them. Rather, under the expedience and guise of a "consent" decree, the court ordered blanket relief to an amorphous class, whose membership could not be known at the time the judgment was entered.

Petitioner does not oppose the legitimate and "large objectives" (*Albermarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975)) of Title VII. Nor does Petitioner generally oppose the policy favoring *valid* voluntary settlements or decrees to remedy effects of specific unlawful past discrimination to actual individuals.

Rather, Petitioner contends that in order to protect the Fourteenth Amendment rights of innocent non-minority employees, Courts in fashioning remedies under Title VII must conform the relief awarded to the statutory limits. Relief as in the present case that is awarded to non-victims at the expense of innocent non-minorities surely makes the protection afforded by the Fourteenth Amendment "a barren form of words." *Truax v. Raich*, 239 U.S. 33, 41 (1915)

CONCLUSION

The present case does not involve purely voluntary action. It involves the entry of a decree, an order of a District Court, over the strenuous objection of the Intervenor, Local 93 as the official collective bargaining representative of all Cleveland Firefighters. Although given full standing as a party to the suit via intervention, their objections were in effect noted and disregarded.

The decree put into effect by the District Court herein awards relief to minorities without any determination that they were actual victims of racial discrimination. This remedy is in no way authorized by Title VII.

Under operation of the decree, non-minority firefighters who have never themselves caused, aided or facilitated any past discriminatory practices, work, study and earn

the right to promotion, only to have the promotion filled by a minority who scored considerably lower on the promotional examination and could or did not show that they were ever an actual victim of racial discrimination.

That such a remedy is beyond the scope of relief permissible under §706(g) of Title VII and at odds with this Court's decision in *Stotts* is clear. But the damage does not stop there. By affording relief to non-victims, relief not authorized by §706(g), the Fourteenth Amendment equal protection rights of the non-minority are bargained away, resulting in a loss of their ability to even collaterally attack operation of the decree and protect their right to earn a living and advance in their chosen profession. Moreover, the decree itself becomes a tool in the hands of the City with which to discriminate against non-minorities.

Finally, the intangible loss. It cannot be doubted that firefighting is the most dangerous of civilian professions. Firefighting, like team athletics, requires precise coordination of all participants. Confidence in the knowledge and ability of their officers is essential to the firefighter who faces life and death situations on a daily basis. Confidence in an officer, whether justified or not, is eroded when his position was gained not through job experience and superior knowledge of his profession, but through operation of a Court Order. That confidence lacking, coordination of operations falls apart, buildings burn, and firefighters and the public are needlessly injured and killed.

For these reasons, and based upon previous decisions of this court, the decree in the present case must be rendered invalid.

Respectfully submitted,

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APPENDIX

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS COMMENCING JANUARY 7, 1982, DISTRICT COURT.

(p. 147) * * *

Comments by the Court:

Well, I wonder whether or not a consent decree shoved down someone's throat is counterproductive of the goal that we seek (p. 148) to achieve.

* * *

(p. 157) * * *

We will be in touch with you on Monday as to a date. In the meantime, I'm expecting some intensive dialogue between all the parties in this case so that we can get a better view of the spirit of this consent decree in a couple weeks.

No. 84-5630

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF TENNESSEE

CHARLIE W. GOODEN, R. C. MITCHELL, SR., CHARLIE MILLER, CHESTER SCALES AND EDDIE B. FARRIS,

Plaintiffs-Appellees,

v.

ILLINOIS CENTRAL GULF RAILROAD AND BROTHERHOOD RAILWAY CARMEN OF THE U.S. AND CANADA, AFL-CIO,

Defendants-Appellees,

BROTHERHOOD OF RAILWAY CARMEN, LODGE @ 164,

Defendant-Appellant,

T.N. SMITH, D.E. BROWER, M.E. BELL, E.G. GATES, W.L. BLEND, and the SENIORITY PROTECTION ASSOCIATION,

Defendant-Intervenors-Appellants.

(Filed September 3, 1985)

BEFORE: *JONES*, Circuit Judge; *EDWARDS*, Senior Circuit Judge; and *SUHR*, District Judge.*

PER CURIAM. The Brotherhood of Railway Carmen, Lodge 164 and five employees of the Illinois Central Gulf Railroad (ICG) appeal the consent decree negotiated by the parties of record and approved by the district court. We affirm the judgment entering the consent decree in this Title VII action.

Five black plaintiffs instituted this action of December 21, 1978, under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981 against the defendants ICG, the Brotherhood Railway Carmen of the United States and Canada (International), and the International's subordinate lodge, Local 164. The plaintiffs' complaint alleged that they were precluded from advancing beyond their lower paying carmen helpers' positions at ICG's facility in Memphis, Tennessee because of a discriminatory seniority system contained in the collective bargaining agreement between the ICG and the International. After extensive discovery, the International and ICG agreed to settle with the plaintiffs. The parties negotiated the terms of the consent decree and the district court entered the order on October 22, 1981. In the Consent Order, ICG and the labor organizations acknowledged that certain of their practices had given rise to the inference that race discrimination exists with respect to the hiring, classification, promotion and lay-off of Carmen Helpers at the Johnston Yard facilities of Defendant Illinois Central Gulf Railroad in Memphis, Tennessee. The Consent Order provided that the seniority dates of the five plaintiffs would be adjusted retroactively. All other claims of the plaintiffs were dismissed with prejudice.

After entry of the Consent Order, Local 164 filed a motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure seeking to vacate the Consent Order. The motion sought leave pursuant to Rule 24(a) of the Fed-

* The Honorable Eugene E. Siler, Jr., Chief Judge, United States District Court for the Eastern District of Kentucky, sitting by designation.

eral Rules of Civil Procedure for five individual members of Local 164 to intervene in the action. The five proposed intervenors were employees of ICG who were laid off as a result of the retroactive adjustment of the plaintiff's seniority dates. Local 164 and the proposed intervenors alleged that they had not received prior notice of the Consent Order's potential adverse effect on the seniority dates of employees other than the plaintiffs.

On March 3, 1982, the District Court conducted a hearing on the motion of Local 164 and the proposed intervenors. Representatives of Local 164 and all five of the proposed intervenors were present. The district court denied the motion. The court concluded that there was no valid basis upon which it could set aside the Consent Decree because considerable discovery had been taken by the parties which uncovered probative evidence of discrimination and because the factors and circumstances established in *Claiborne v. Illinois Central Railroad*, 583 F.2d 143 (5th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979) (upholding claims of racial discrimination by carmen helpers at the Railroad's New Orleans facility), were substantially similar to those existing at the Railroad's Memphis location. The district court further held that while the proposed intervenors may have a cause of action against the International or Local 164 based on their alleged lack of prior notice of the potential adverse impact of the Consent Order, such allegations did not provide a sufficient basis to vacate the Consent Order.

The appellants contend that the district court abused its discretion in approving initially, and in refusing subsequently to vacate, the negotiated Consent Order. In Title VII litigation, negotiated consent settlements enjoy a presumption of validity. *United States v. City of Alexandria*, 614 F.2d 1358, 1359, 1362 (5th Cir. 1980). We do not believe that the district court abused its discretion in entering the decree. The decree was negotiated by the employer, the International, and the plaintiff's and approved by the district court. We reject appellants' contention that *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984) controls this case. In *Stotts*, the Court ruled that a court may not disregard a *bona fide* seniority system by ordering retroactive seniority even though adherence to the system would frustrate the attainment of racially-based hiring and promotion percentage goals contained in a consent decree. The Court specifically held that Title VII protects *bona fide* seniority systems against assault in a pattern and practice suit. The Court noted, however, that rightful place seniority may be awarded upon a showing that specific individuals were actual victims of discrimination. *Id.* at 2588.

Evidence of actual discrimination existed in this case as to each of the five plaintiffs. The original collective bargaining contract was effective August 20, 1945. At that time there was a segregated system, with black employees assigned to be carmen helpers, and white employees allowed to be carmen apprentices. In 1972, apprentices were given retroactive seniority upon advancement, whereas carmen helpers were not. Three of the five plaintiffs were hired prior to 1965 and the other two prior to 1968 when blacks were mainly hired into helper positions; the individual appellants, on the other hand, were all hired into the apprenticeship program in 1974. An employee who is a carman helper keeps his helper seniority for layoff and other purposes just as apprentices keep their apprentice seniority vis-a-vis other apprentices. However, if

a helper were to transfer into the apprenticeship program, he would lose his helper seniority and be at the bottom of the apprenticeship list subject to immediate furlough; thus an incentive exists for helpers to stay in—or be "locked-into"—that position. Similarly, a black helper working 20 years for the IOU who "earned" his carman seniority date would similarly be placed at the bottom of the carmen's seniority roster. In contrast, when the apprentices eventually earned the right to be placed on the carmen's seniority roster, they received a retroactive date back to the date they began their apprenticeship. Thus, there was a clear potential for the five plaintiffs to make a showing of actual individual discrimination. *See also Claiborne v. Illinois Central Railroad*, 583 F.2d 143 (5th Cir. 1978) (finding of individual discrimination in nearly identical circumstances). Consequently, the district court did not abuse its discretion in entering the consent decree.

The appellant also argued that the district court erred in entering the decree because they were not given notice of the consent order. This argument is without merit. Local 164 is a subordinate body of the International with certain day-to-day duties concerning its membership and the application of the parties' labor agreements, but it is the International that has ultimate authority with respect to the consummation of amendments to the agreements and any adjustment in the applicable seniority provisions. The International rather than Local 164 has exclusive jurisdiction over the original negotiation and any subsequent modification of the collective bargaining agreement, including the provisions for seniority rights. *Childers v. Brotherhood of Railway Trainmen*, 192 F.2d 956 (9th Cir. 1951).

Last, the denial of the motion to intervene was not error because the intervenors had no legally cognizable interest in the seniority provisions. In *Stotts v. Memphis Fire Department, (Stotts II)*, 679 F.2d 579, 582 (6th Cir. 1982), *rev'd on other grounds*, 104 S. Ct. 2576 (1984), the Sixth Circuit stated as follows regarding the application of eleven non-minority employees to intervene in a Title VII action under Rule 24(a) for the purpose of opposing a consent settlement that adversely affected their seniority positions: "There is no legally cognizable interest in promotional expectations which presumptively could only occur as the result of discriminatory employment practices." Under circumstances such as those present in the instant case, the district court was required only to give the proposed intervenors "an opportunity to air their objections." *Id.* at 584. Having done so, the district court did not abuse its discretion in denying the motion to intervene.

Accordingly, we AFFIRM the judgment of the district court.

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS COMMENCING APRIL 27, 1982, DISTRICT COURT

By Mr. Summers:

(p. 26) • • •

Money and lawsuits challenging the validity of the test by black and white fire(p. 27)fighters standing next to each other as the plaintiffs in the Common Pleas Court is the reason that there hasn't been more hiring and is the reason that there hasn't been promotions.

A city that went through bankruptcy, instead of having promotional tests, paid time and a half overtime to have men set out of grade and men come in on their days off and work overtime in the officer ranks.

• • •

Nolen—direct

(p. 56) Q. Now, after you came on in 1973, when were you first eligible to take a promotion examination?

A. Promotional exam?

Q. Yes. When were you first?

A. This past November—oh.

Q. When did you first qualify year-wise to take a (p.57) promotion exam?

A. That would have been, let's see, we came on in 73, so it would have been 1976.

Q. Did you take an exam in 1976?

A. No, sir.

Q. Did you take an exam in 1977?

A. No, sir.

Q. When did you, when were you able to compete for promotion?

A. First time that I was able to compete for a promotion was in the exam given November, 1981.

Q. Now, did that hold true for the other minorities in your particular group—

A. Yes, it did.

Q. —that came on in 1973; that is, that they had to wait until 1981 to compete for promotion?

A. That's correct.

• • •

Wolke

(p. 112) • • •

Q. Local 93's members consist of both minorities and non-minorities, do they not?

A. That's correct.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case Number: C80-1964

Judge: Thomas D. Lambros

TIMOTHY J. DONOVAN
366 E. 210th Street
Willowick, Ohio 44094

and

ROBERT A. KAZIMORE
9820 Reinhert Road
Parma, Ohio 44130

and

ROGER S. MANZUK
26604 Fleteare Avenue
North Olmsted, Ohio

and

PAUL C. SCHEUTZOW
7010 Dellbank
Cleveland, Ohio 44147

and

PATRICK KILGOYNE
3491 W. 130th Street
Cleveland, Ohio 44111

and

KEITH J. DEVINE
2879 Eastwood Avenue
Fairview Park, Ohio

and

LOCAL NO. 93, I.A.F.F.
AFL-CIO

Petitioners

vs.

THE VANGUARDS OF CLEVELAND, et al.

and

THE CITY OF CLEVELAND, et al.

Respondents

Petition for Writ of Mandamus
(Filed August 3, 1983)

FIRST CAUSE OF ACTION

1. Petitioners Timothy J. Donovan, Robert A. Kazimore and Roger S. Manzuk are presently members of the Cleveland Fire Department in the rank of Lieutenant, and stood one, two, and three in order respectively to obtain the rank of captain on the 1981 eligibility list which expired June 15, 1984.

2. Petitioners Paul C. Scheutzow, Patrick Kilcoyne, and Keith J. Devine are presently members of the Cleveland Fire Department in the rank of Firefighter and stood one, two and three in order respectively to obtain the rank of Lieutenant on the 1981 eligibility list which expired June 15, 1984.

3. Petitioner Local 93 is a labor organization of which the individual petitioners are members and is an intervenor in the original court action.

4. Respondents Vanguard and the City of Cleveland are parties to the original action and have agreed to execute the consent decree entered into effect by this court on January 31, 1983.

5. Pursuant to Paragraph twenty-four (24) of the consent decree ordered into effect on January 31, 1982, this court has exclusive jurisdiction as to any challenges which may be presented to any of the promotional examinations of eligible lists provided for. Therefore, this court, by virtue of the January 31, 1982 decree has preempted jurisdiction as to enforcement of said decree.

6. Petitioners have no adequate remedy at law and have a clear right to the issuance of a Writ of Mandamus.

7. On or about March 30, 1984, while the 1981 eligibility list was in effect, the staffing levels for the ranks of lieutenant and captain within the City of Cleveland Fire Department was one hundred fifty-six (156) and sixty-six (66) respectively.

8. Subsequent to March, 1984, on or about May 11, 1984 the actual staffing of the ranks of lieutenant and captain decreased to one hundred fifty-five (155) and sixty-three (63) respectively, creating vacancies for at least three (3) captains and four (4) lieutenants.

9. Respondent City of Cleveland's past practice and procedure was to fill vacancies in staffing levels as soon as practicable after said vacancies occurred.

10. Petitioner Local 93 was advised by Respondent City of Cleveland that no promotions would be made due to the fact that Respondent City was decreasing its staffing levels.

11. Had respondent City of Cleveland not advised Petitioners of its desire to decrease the staffing levels in accordance with past practice and procedure, three (3) lieutenants would have been promoted to the rank of captain to fill the three (3) vacancies and three (3) firefighters would have been promoted to lieutenant to replace those promoted to captains.

12. On or about May 25, 1985, after the new 1984 eligibility list came into effect, ten (10) individuals were promoted to captain from the rank of lieutenant, increasing the staffing level of captain to sixty-six (66).

13. The purpose on the part of Respondent City in temporarily decreasing the staffing levels until such time as new eligibility lists became effective was to give preferential treatment to minority firefighters over white firefighters.

14. The actions of Respondent City of Cleveland in temporary reducing the staffing levels of captains until such time as the new 1984 eligibility list became effecti e constitutes a practice of discrimination in employmen against white firefighters as well as a denial of the full employment rights secured by all Americans regardless of race, by the Ohio and United States Constitution.

15. Respondent City's conduct has the purpose and effect of racially discriminating against white firefighters in employment and denies to those white firefighters equal treatment under the laws of the State of Ohio and the United States, in violation of the Ohio and United States Constitutions.

16. Petitioners have been damaged by actions of Respondent City.

SECOND CAUSE OF ACTION

17. Petitioners hereby restate as if fully rewritten and incorporate herein all of the allegations contained in

Paragraphs one (1) through seventeen (17) of this petition.

18. Paragraph four (4) of the amended consent decree ordered into effect by this court on January 31, 1982 states in part, "The defendants shall utilize only such promotion criteria as are non discriminatory . . ."

19. The aforementioned actions of Respondent City of Cleveland are in direct violation of said constant decree.

WHEREFORE, the Petitioners demand judgment as follows:

I. That this court issue a Writ of Mandamus commanding Respondent City of Cleveland to immediately promote the six individual Petitioners to their respective ranks of Captain and Lieutenant of the Cleveland Fire Department.

II. That said promotions be made retroactive to May 11, 1984 for the purposes of determining salary, with interest, seniority, subsequent promotional lists, and other benefits.

III. That this court order a hearing on this petition with the earliest possible date.

IV. That this court enter judgment awarding them their costs, attorneys fees, and such other relief as this court may deem just, proper and equitable.

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NORMAN A. FOX, JR.
SUMMERS, FOX, SIEWERT & McGINTY
Attorneys for Petitioners
1818 Standard Building
Cleveland, Ohio 44113
(216) 696-0727

SERVICE

A copy of the foregoing petition was hand delivered this 5th day of August, 1985 to Edward R. Stege, Jr., attorney for the plaintiff, 1800 Standard Building, Cleveland, Ohio 44113, and to John D. Maddox, attorney for defendants, Room 106, City Hall, 601 Lakeside Avenue, Cleveland, Ohio 44114, by ordinary US mail.

WILLIAM L. SUMMERS
Attorney for Petitioners

STATE OF OHIO
SS:
COUNTY OF CUYAHOGA

Affidavit of James Andrews

Now comes the affiant, JAMES ANDREWS who, first being duly sworn, deposes and says that he is the President of Local Number 93, International Association of Firefighters, AFL-CIO, C.L.C., one of the Petitioners herein; that he has read the foregoing Petition for Writ of Mandamus that to the best of his knowledge, the allegations contained therein are true and accurate.

/s/ James M Andrews
JAMES ANDREWS

SWORN TO BEFORE ME and subscribed in my presence this 5th day of August, 1985

/s/ Norman A. Fox
NOTARY PUBLIC

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

C80-1964

VANGUARDS OF CLEVELAND, ET AL.,

Plaintiffs

v.

CITY OF CLEVELAND, ET AL.,

LAMBROS, DISTRICT JUDGE

ORDER

(Filed November 4, 1985)

This employment discrimination case is presently before the Supreme Court of the United States upon a writ of certiorari. Intervenor Local Number 93 has recently filed two pleadings in this Court 1) a motion to seal test results and suspend promotions and 2) a petition for a writ of mandamus.

In its motion for to seal test results and suspend promotions intervenor asserts that enforcement of the consent decree previously entered by this Court and approved by the Sixth Circuit should be suspended so as to avoid the possibility of personnel actions which are inconsistent with the Supreme Court's ultimate decision. Without intending any comment on the legitimacy of this concern, the undersigned Judge finds that, because the Sixth Circuit's decision is presently under review, only that Court or a Justice of the Supreme Court has authority to stay implementation of the consent decree. *See* Sup. Ct. R. 44. Accordingly, petitioner's motion to seal test results and suspend promotions is denied.

In its petition for a writ of mandamus, intervenor contends that the City of Cleveland has violated the consent decree by decreasing the staffing levels for certain firefighter positions. It is not clearly apparent that the matters presented by intervenor's petition were the subject of the Sixth Circuit's decision or that they are presently before the Supreme Court. However, the pendency of this case before the Supreme Court and a lack of any allegation by intervenor that its members will be irreparably harmed if a writ of mandamus does not issue forthwith, make it appropriate for this Court to defer consideration of intervenors petition for a writ of mandamus pending the Supreme Court's decision.

IT IS SO ORDERED.

/s/ Thomas D. Lambros
United States District Court

RESPONDENT'S

BRIEF

No. 84-1999

Supreme Court, U.S.
FILED
JAN 24 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

October Term, 1985

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, C.L.C.,
Petitioner,

vs.

CITY OF CLEVELAND, *et al.*,
and
VANGUARDS OF CLEVELAND,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR SEPARATE RESPONDENTS CITY OF CLEVELAND, ET AL.

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QUESTION PRESENTED FOR REVIEW

I. Did the district court abuse its discretion in approving as fair, reasonable and adequate an amended consent decree voluntarily entered into by plaintiff class, Vanguards of Cleveland, an organization of minority firefighters, and Defendants, City of Cleveland, Ohio, and various city officials, over objection of Intervenor Local Number 93, to settle Plaintiff's claims of employment discrimination under either (1) the thirteenth and fourteenth amendments to the United States Constitution and 42 U.S.C. §§ 1981 and 1983, or (2) Title VII of the Civil Rights Act of 1964, when:

(a) the City admitted a long history of discrimination against minorities in the hiring and promotion practices of the City of Cleveland Division of Fire;

(b) the City has for many years operated its Divisions of Police and Fire under separate consent decrees entered during protracted litigation in which two other federal district judges found that the City had discriminated in police and fire hiring and police promotions by using procedures virtually identical to those giving rise to the claims in this case, such prior cases having been brought under the thirteenth and fourteenth amendments and 42 U.S.C. §§ 1981 and 1983;

(c) the district court conducted multiple fairness hearings and a year of negotiations, primarily magistrate supervised, during which Local 93 was given unlimited opportunity to introduce evidence and voice its concerns;

(d) substantial concessions were made by the Vanguards and the City to Local 93 during those negotiations;

(e) the potential impact of the specified prospective race-conscious relief was very limited in view of the stark disparity between the percentage of minorities in supervisory ranks (4.5%) and the percentage of minorities in either the Division of Fire (14%) or the population of Cleveland (47%);

(f) the duration of prospective race-conscious relief was limited to less than five years;

(g) every plaintiff class member who by the express terms of the 1983 decree could potentially benefit from the prospective race-conscious relief was already an appointed firefighter and was expressly identified to the district court by name; and,

(h) in stating its objection to the Amended Consent Decree, Local 93 acknowledged on the record the fairness of the district court?

PARTIES BEFORE THE COURT OF APPEALS

In the United States Court of Appeals for the Sixth Circuit, the Appellant was Intervenor, Local Number 93, International Association of Firefighters, AFL-CIO, CLC.

The Appellees were Plaintiff, the Vanguards of Cleveland, and Defendants, the City of Cleveland, Ohio, and various of its officials including Mayor George V. Voinovich, Public Safety Director Vincent Amato, Fire Chief William E. Berry, the Civil Service Commission of the City of Cleveland and its members, Thomas R. Skulina, Mary R. Bubna, Edward H. Mason, P. L. Fenderson, and Edmund J. Turk.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions Petitioner identifies as being involved, the following constitutional and statutory provisions are involved:

1. United States Constitution Amendment XIII:

   Section 1. Slavery prohibited.

   Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

   Section 2. Power to enforce amendment.

   The Congress shall have power to enforce the provisions of this article by appropriate legislation.

2. Civil Rights Act of 1866, 42 U.S.C. § 1981 (1982):

   All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other.

3. Civil Rights Act of 1871, 42 U.S.C. § 1983 (1982):

   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF FACTS

1. Background

Since 1972, the City of Cleveland ("City") has been litigating class action hiring and promotion discrimination claims arising from its Divisions of Police and Fire. Since that time, the City has been operating those Divisions under judicially approved hiring and promotion quota plans.

On October 12, 1972, an organization of minority police officers filed *Shield Club v. City of Cleveland*, Civil Action No. 72-1068 (N.D. Ohio),[1] alleging intentional discrimination by the City in the hiring and promotion of minority police officers in violation of the thirteenth and fourteenth amendments and 42 U.S.C. §§ 1981 and 1983. Exh. 16A. Following trial, District Judge William K. Thomas, by order of December 21, 1972, ruled that the City had discriminated against minorities in police hiring and imposed a hiring quota for minorites. Exh. 16C at 1. Following another hearing, Judge Thomas, by order of July 6, 1974, ruled there was discrimination in police promotions and enjoined certain promotions. Exh. 16C.

By order of September 29, 1976, Judge Thomas reconsidered certain of his promotional orders in light of *Washington v. Davis*, 426 U.S. 229 (1976), and found that the City's conduct met the requirements of that case in applying 42 U.S.C. § 1981 to the employment discrimination claims before him. Exh. 16D. Subsequently, on November 11, 1977, Judge Thomas approved a consent decree specifying hiring and promotion quotas for minority police officers. Exh. 16E.

Similar results were reached in *Headen v. City of Cleveland*, Civil Action No. 73-330 (N.D. Ohio),[2] a class action in which minorities alleged intentional discrimination in the hiring of firefighters in violation of the thirteenth and fourteenth amendments and 42 U.S.C. §§ 1981 and 1983. Since the Division of Fire hiring examination was "identical" to the police hiring examination invalidated by Judge Thomas in *Shield Club*, Exh. 15B, three days after filing, Judge Robert B. Krupansky entered a consent order finding the hiring examination discriminatory and imposing minority hiring quotas identical to the *Shield Club* quotas. Exh. 15E.

Following hearing, Judge Krupansky, on April 25, 1975, entered an order enjoining all hiring by the Division of Fire until acceptable hiring procedures were approved by the court. Exh. 15B. *Headen*, was reassigned to District Judge John M. Manos, who by order of January 17, 1977, Exh. 15D, approved a remedial plan incorporating prospective race-conscious hiring quotas. Exh. 15C.

The City still operates its Divisions of Police and Fire under the *Shield Club* and *Headen* orders which prescribe hiring quotas.[3] The *Shield Club* consent decree requires hiring three minority police officers for every four

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1. The relevant *Shield Club* pleadings and orders were introduced at the January fairness hearings. Exhibits 16A-E. Transcript of Proceedings held January 6, 1982, at 23 ("Jan. Tr."), Jan. Tr. 26 ("Exh. 16").

2. The relevant *Headen* orders and pleadings were introduced at the January fairness hearings. Exhibits 15A-E. Jan. Tr. 23, Jan. Tr. 26 ("Exh. 15").

3. The police promotion quotas expired on December 31, 1984. Exh. 16F at 18.

1981, the City Council by ordinance created and prescribed the duties of a new City Office of Equal Opportunity. Exh. 9, 10, Jan. Tr. 74, Jan. Tr. 77. Similar programs have been legislatively created.[4]

It was against this background that the City had to evaluate and defend the claims brought in this case.

II. This Case

On October 23, 1980, the Vanguards of Cleveland ("Vanguards"), an organization of minority firefighters employed in the City of Cleveland, Division of Fire, filed a Class Action Complaint alleging, in part, intentional employment discrimination by the City of Cleveland and various of its officials[5] ("the City") in the promotion of minority firefighters. J.A. 6-14.

As to discrimination in promotions, the Complaint alleged the following discriminatory practices:

> a. The use of written tests as a prerequisite for promotion which exclude a disproportionately high number of minority applicants for promotion, as opposed to white applicants;
>
> b. The use, prior to 1975, of seniority points, said practice having the effect of reinforcing the impact of discriminatory hiring practices;

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4. For example, the City Administration introduced legislation designed to increase the level of minority business enterprise participation in City contracts in 1982, see proposed Cleveland, Ohio Ord. No. 1065-82 (introduced May 12, 1982), which was passed as amended in 1983, see Cleveland, Ohio Ord. No. 1065-B-82 (March 7, 1983).

5. The public officials included Mayor George V. Voinovich, Public Safety Director Vincent J. Amato, Fire Chief William E. Berry and the Cleveland Civil Service Commission and its members.

non-minority police officers. Exh. 16E at 4. The *Headen* plan requires hiring minority firefighters in proportion to the percentage of minority firefighters passing the entrance examination. Exh. 15C at 6.

Simultaneously with the City's attempt to disengage from this protracted litigation and to implement the orders in both *Shield Club* and *Headen*, financial disaster struck on December 15, 1978, when the City of Cleveland legally defaulted on its financial obligations. Cleveland, Ohio Ord. No. 856-80 (Apr. 21, 1980) (reproduced in attached appendix at A-1). On November 29, 1979, the legislature of the State of Ohio enacted new Chapter 118, Local Fiscal Emergencies, prescribing procedures by which a local government could extract itself from a condition of fiscal emergency. *See* Ohio Rev. Code Ann. §§ 118.01-.99 (Baldwin 1984).

A team of outside auditors concluded "that as of November 11, 1979 the treasury account had $110,509,366 more in outstanding liabilities than it had in available assets." Financial Plan of City of Cleveland (Apr. 21, 1980) (reproduced in appendix at A-4). On January 4, 1980, the Auditor of the State of Ohio determined that the City of Cleveland was in a condition of fiscal emergency. Cleveland, Ohio Ord. No. 856-80, *supra*. The City is still paying off those liabilities. *See, e.g.*, Cleveland, Ohio Ord. No. 2826-85 (Dec. 2, 1985) (attached appendix at A-5).

Notwithstanding these judicial and fiscal constraints, the City independently instituted programs which recognized its obligations to all of its citizens, almost half of whom were minority. J.A. 105. On October 26, 1981, the City Administration promulgated a new "Affirmative Action Policy Statement & Program for Equal Opportunity." Exh. 11, Jan. Tr. 74, Jan. Tr. 77. On December 14,

c. The manipulation of retirements vis a vis the date upon which each promotional eligibility list expires, so as to preclude minorities from being promoted; and

d. The failure of the City to give a promotion examination since April 29, 1975 thereby disproportionately disadvantaging the increased number of minorities who were hired in 1973. J.A. 11.

The Complaint described the discriminatory effect:

> Today only 10 of 248 men or 4.3% of those occupying the ranks of Lieutenant and higher are minorities. And of the 113 persons promoted to Lieutenant from the last promotion list, only 3 were minorities. J.A. 11.

The Vanguards sought extensive remedial relief including a promotion program designed to eliminate the present effects of past discriminatory practices, back pay, compensatory damages, and attorney's fees. J.A. 13.

Local Number 93 of the International Association of Firefighters ("Local 93") was permitted to intervene on June 5, 1981. J.A. 24-25. In its "Complaint of Applicant for Intervention," Local 93's sole allegation as to the impact of this case on itself or its members was that they "may be affected by any decision which may be rendered in the instant lawsuit." J.A. 27. Local 93 did not state a claim against any party in the lawsuit and no party ever asserted a claim against Local 93. Despite over a year of hearings and negotiations in which Local 93 fully participated, Local 93 never sought to amend its "Complaint." J.A. 1-8.

On November 10, 1981, the Vanguards and the City tendered to the court their first settlement proposal in the form of a consent decree. J.A. 1, 30-39. During fairness hearings on January 7 and 8, 1982, the evidence included "Stipulations of Fact" between the City, Vanguards and *Local 93* which established:

1. The percentage of minority residents in the City was 46.9% in 1980.

2. The percentage of minority firefighters in the Division of Fire was 14.2% on December 31, 1981.

3. Of 233 personnel in the ranks of Lieutenant and above, only 10 were minority (4.5%) on December 1, 1981.

4. While 24.9% of non-minority personnel were in the ranks of Lieutenant and above, only 7.1% of the minority personnel were in the ranks of Lieutenant and above.

5. The distribution of personnel in the ranks of the Division of Fire was as follows:

Rank	Total	Minority	Percentage
Chief	1	0	0.0%
Assistant Chief	2	0	0.0%
Battalion Chief	21	2	9.5%
Captain	60	4	6.6%
Lieutenant	139	4	2.8%
Subtotal	223	10	4.5%
Firefighters	772	131	16.9%
Total	995	141	14.2%

J.A. 105-07.

Vanguards introduced statistics establishing that since 1975, out of the 420 promotions made to Lieutenant and Captain, only seven, or 1.7%, were minority. J.A. 120-21.

The City introduced testimony by the Director of Public Safety, who is responsible for the activities of the Division of Fire. Jan. Tr. 71. He testified that:

> This decree will provide a representative number of fire officers, and by representative I mean reflecting the total community, and that influence, that presence, in light of the qualifications of all, will provide better leadership, better supervision, better management, better direction [and] better control of the fire effort. *Id.*

At the conclusion of the hearing on January 8, 1982, the court urged the Vanguards, the City and Local 93 to negotiate a settlement. The court said:

> I think you people ought to spend a couple of weeks in further dialogue and I don't think the Fire Fighters are going to be able to win their position on the basis that, "Well, Judge, you know, there's something inherently wrong about quotas. You know, it's not fair." We need more than that. J.A. 55.

After two more days of hearings on April 27 and 28, the court referred the case to a magistrate who conducted "approximately forty hours of meetings . . . spread over eight dates, most of which were held with representatives of the Plaintiff and the Intervenor at hand for consultation." J.A. 77. As a result of those discussions, a second settlement proposal was prepared in the form of a revised consent decree. J.A. 77. The magistrate reported to the court:

> Each of the counsel, including those representing the City who were concerned that any settlement not extend beyond what they perceived the legitimate issues of the lawsuit to be, was thus presented with the difficult burden of advancing their client's concerns while at the same time seeking to arrive at an agreement structured upon the mandates of the law but not ignoring the realities of what was reasonable under the circumstances. J.A. 81.

Although approved by the City and the Vanguards, the revised consent decree proposal was overwhelmingly rejected by a vote of 660 to 89 by the membership of Local 93. Cert. Pet. at A31.

The Vanguards and the City then submitted an Amended Consent Decree settlement proposal to the court on January 11, 1983. This proposal was "patterned very closely upon the revised decree negotiated under the supervision of [the magistrate and reflected] *substantial concessions by the plaintiffs and the defendants when compared to the first proposed consent order, such concessions reflecting concerns raised by Intervenor.*" Cert. Pet. at A31 (emphasis added).

Key provisions of the race-conscious promotion plan, to be in effect for less than five years, included:

1. For February, 1983, promotions based on the then unknown results of the 1981 promotion exams, "[a]ll minority members who pass [a maximum possible of 10, J.A. 106] . . . out of 52 mandated promotions to the ranks of Assistant Chief, Battalion Chief, and Captain, would be promoted." For the rank of Lieutenant a one-for-one promotion ratio was established for 66 mandated positions, except if there were insufficient minorities who passed the test, the balance would be filled by non-minority candidates. A shortfall in Lieutenants was to be made up on the next exam. No shortfall provision was made for ranks above Lieutenant. Cert. Pet. at A34-36.

2. For the 1984 test, specified goals were Lieutenant (23%), Captain (10%), Battalion Chief (10%), and Assistant Chief (20%). No shortfall provision was made. *Id.*

3. For the 1985 test, specified goals were Lieutenant (20%) and for ranks above Lieutenant (25%). No shortfall provision was made. *Id.*

On January 25, 1983, Local 93 filed its Objections to Consent Decree in which it again "reiterate[d] its absolute and total objection to the use of racial quotas . . . ." J.A. 98. Nonetheless, Local 93 complimented the court:

> This Court made quite obvious the fact that these issues [asserted by Local 93] would, within the law embodied herein, be taken into account and Intervenors are confident that within the prescribed limitations this objective was clearly met. J.A. 97.

By Memorandum Opinion and Order of January 31, 1983, the district court approved the Amended Consent Decree as a settlement of this class action suit. *Vanguards of Cleveland v. City of Cleveland*, Civil Action No. 80-1964 (N.D. Ohio Jan. 31, 1983) (City Brief in Opposition to Petition for Certiorari ("City Cert. Br.") Appendix at A-1-6). Among its findings and rulings, the court recited the multiple claims:

> This action was brought pursuant to 42 U.S.C. § 1981, 42 U.S.C. § 1983, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, to redress alleged racial discrimination in promotions within the City of Cleveland Fire Department. City Cert. Br. at A1.

summarized the evidence establishing the effects of discrimination:

> The documents, statistics, and testimony presented at the January and April 1982 hearings reveal a historical pattern of racial discrimination in promotions in the City of Cleveland Fire Department. *Id.* at A3-4.

stated the specific obective of the remedy:

> The January 11th proposed decree creates a plan that will last through 1987 to remedy the effects of this history of discrimination. *Id.* at A4.

balanced the means employed to effect the remedy:

> [T]he use of a quota system for the relatively short period of four years is not unreasonable in light of the demonstrated history of racial discrimination in promotions in the City of Cleveland Fire Department. It is neither unreasonable nor unfair to require non-minority firefighters who, although they committed no wrong, benefited from the effects of the discrimination to bear some of the burden of the remedy. *Id.* at A5.

and held:

> The January 11, 1983 proposed consent decree is hereby adopted as a fair, reasonable, and adequate resolution of the claims raised in this action. *Id.*

On appeal to the United States Court of Appeals for the Sixth Circuit, the court recognized that "[t]he [district] court adopted the consent decree 'as a fair, reasonable, and adequate resolution of the claims raised in this action.'" *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479, 483 (6th Cir. 1985). The court analyzed and approved the multiple grounds for the trial court's judgment. "Since nothing in [T]itle VII, as interpreted in *Stotts*, forbids this consent decree and since, as we have already determined, . . . the decree is proper under the standards recognized in cases such as *Bratton*, the judgment of the court is AFFIRMED." *Id.* at 489. The court concluded: "[W]e hold that the district court did not abuse its discretion in approving the proposed consent decree." *Id.* at 485.

Local 93's motion for rehearing *en banc* was denied on April 22, 1985, and this Court granted Local 93's Petition for Writ of Certiorari on October 7, 1985.

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in approving prospective race-conscious relief as a means to ameliorate the effects of historical discrimination, in a settlement of the claims in this case under the thirteenth and fourteenth amendments, 42 U.S.C. §§ 1981 and 1983, and Title VII of the Civil Rights Act of 1964.

Local 93 had a right to be heard, not a right to veto this settlement. The district court recognized and afforded Local 93 every right due.

The fourteenth amendment does not preclude the City from taking prospective race-conscious action to eliminate the effects of discrimination. Such action embodied in a consent decree does not become illegal solely because of extensive prior judicial scrutiny.

The limitation, if any, of § 706(g) on "make whole" relief under Title VII is inapplicable to the district court's equitable power to employ a prospective race-conscious remedy to eliminate the effects of discrimination.

ARGUMENT

I. The District Court Did Not Abuse Its Discretion in Approving the Amended Consent Decree as Fair, Reasonable and Adequate Under the Thirteenth and Fourteenth Amendments and 42 U.S.C. §§ 1981 and 1983, and Title VII of the Civil Rights Act of 1964.

The evidence in the record before this Court is uncontroverted and unassailable that:

1. Two federal district court judges had previously determined that the hiring and promotion practices of the City Department of Public Safety, including its Division of Fire, violated the thirteenth and fourteenth amendments and 42 U.S.C. §§ 1981 and 1983. Exh. 15B-E; Exh. 16B-E.

2. The City was operating its Police and Fire Divisions under consent orders prescribing hiring or promotion quotas when this case was filed. Exh. 16E; Exh. 15C.

3. The Division of Fire promotion practices resulted in a substantial disparity between the percentage of minorities in the promoted ranks (4.5%) and the percentage of minorities in either the Division of Fire (14.2%) or the population of Cleveland (over 46.9%). J.A. 105-07.

4. There was a substantial disparity in the promotion process itself. Since 1975 only seven of 420 promotions, or 1.7%, to Lieutenant and Captain were minority. J.A. 120-21.

5. The City admitted that "there has been a long history of discrimination against minority persons in the

hiring and promotion practices of the City of Cleveland Division of Fire," that "prior litigation has confirmed the existence of this history of discrimination . . . but has failed to eliminate the present effects of such discriminatory practices," and that "many of the practices used in the past to discriminate against minority applicants for promotion in the Cleveland Division of Fire were substantially similar to those used by the Cleveland Division of Police." Cert. Pet. at A29-30.

6. The district court found that "[t]he documents, statistics, and testimony presented at the January and April 1982 hearings reveal a historical pattern of racial discrimination in promotions in the City of Cleveland Fire Department." City Cert. Br. at A3-4.

It is on this record that this Court must determine whether the district court abused its discretion in approving, on multiple grounds, the Amended Consent Decree as a fair, reasonable and adequate settlement[6] of Vanguards' claims.

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6. In an apparent effort to force this case into a *Stotts* paradigm, Local 93 attempts to convince this Court that the Amended Consent Decree is in effect a final judgment on the merits. This is untrue. "The parties have a right to compromise their dispute on mutually agreeable terms, and those terms may include the incorporation of their settlement into a judicial decree. *See Carson v. American Brands, Inc.*, 450 U.S. 79, 84 . . . (1981)." *United States v. City of Miami*, 664 F.2d 435, 440 (5th Cir. 1981) (en banc). Refusal to approve a consent decree was held by this Court to be a final judicial order because the act "denied petitioners the opportunity to compromise their claim and to obtain the injunctive benefits of the settlement agreement they negotiated." *Carson v. American Brands, Inc.*, 450 U.S. 79, 89 (1981).

A. The issue before this Court is whether the district court abused its discretion in approving the Amended Consent Decree as fair, reasonable and adequate.

In reviewing this settlement of claims, this Court should affirm unless the district court abused its discretion in approving the settlement. "In fashioning an appropriate remedy for employment discrimination, Congress has granted courts plenary equitable power under . . . section 1981." *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 243 (5th Cir. 1974), *cert. denied*, 104 S. Ct. 3515 (1984). Therefore, in approving the Amended Consent Decree, the district court exercised a "traditional function of the equity court, the exercise of which is reviewable only for abuse of discretion." *Brotherhood of Locomotive Eng'rs v. Missouri-Kansas-Texas R.R. Co.*, 363 U.S. 528, 535 (1960). A reviewing court's "power, as the . . . authorities abundantly affirm, is only to be exercised 'upon a clear showing that the district court abused its discretion' in approving the settlement." *Flinn v. FMC Corp.*, 528 F.2d 1169, 1172 (4th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976).

When a trial court considers a proposed class action settlement, "the universally applied standard is whether the settlement is fundamentally fair, adequate and reasonable [citations omitted]." *Officers for Justice v. Civil Serv. Comm'n.*, 688 F.2d 615, 625 (9th Cir.), *cert. denied*, 459 U.S. 1217 (1983). In deciding whether to approve a consent order, "[courts] do not decide the merits of the case or resolve unsettled legal questions." *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981). "[A]s long as the terms of a consent decree come 'within the general scope of the case made by the pleadings,' [*Pacific*

R.R. v. Ketchum, 101 U.S. 289, 297 (1879)] it will be within the district court's power to enter the decree, if the pleadings state a claim over which a federal court has jurisdiction." *Sansom Comm. v. Lynn*, 735 F.2d 1535, 1538 (3d Cir.), *cert. denied*, 105 S. Ct. 431 (1984). This Court has emphasized the "strong preference for encouraging voluntary settlement of employment discrimination claims." *Carson*, 450 U.S. at 88, n.14.

B. The court of appeals properly held that the district court did not abuse its discretion.

The district court approved the Amended Consent Decree based upon the thirteenth and fourteenth amendments, 42 U.S.C. §§ 1981 and 1983, and Title VII of the Civil Rights Act of 1964. The court of appeals recognized and affirmed on these alternative grounds. *Vanguards*, 753 F.2d at 489.[7]

Availability of relief from employment discrimination claims under the thirteenth and fourteenth amendments and the century-old Civil Rights Acts is uncontroverted. For over a decade, this Court has recognized that:

> [L]egislative enactments in this area have long evinced a general intent to accord parallel or overlapping rem-

7. Although Local 93 and the Department of Justice have chosen to ignore the alternative grounds of decisions by the courts below, *see* Brief for the United States as Amicus Curiae Supporting Petitioner ("Justice Br.") at 3 n.1, the only conceivable interpretation of the last paragraph of the court of appeals' opinion, 753 F.2d at 489, its expressly divided analysis, parts III and IV, *id.* at 484-85, and footnotes 1 and 10, *id.* at 484 n.1 and 489 n.10, is that the court intended to affirm on other grounds alternative to Title VII. In any event, the City, as "a prevailing party may urge any ground in support of the judgment, whether or not that ground was relied upon or even considered by the court below." *United States v. Arthur Young & Co.*, 465 U.S. 805, 814 n.12 (1984); *Trans World Airlines, Inc. v. Thurston*, 105 S. Ct. 613, 621 n.14 (1985).

> edies against discrimination' . . . . Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47-48 (1974).

In *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), this Court held that "the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent." *Id.* at 461.

Since *Alexander*, availability of 42 U.S.C. § 1981 as an independent remedy for employment discrimination has been recognized by the appellate courts. In *Davis v. County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625 (1979), the court of appeals said:

> During recent history, every court which has considered the question has construed § 1981 to bar discrimination in employment. *See Long v. Ford Motor Co.*, 496 F.2d 500 (6th Cir. 1974); *Macklin v. Spector Freight Sys., Inc.*, 156 U.S.App.D.C. 69, 478 F.2d 979 (1973); *Brady v. Bristol-Meyers, Inc.*, 459 F.2d 621 (8th Cir. 1972); *Brown v. Gaston County Dyeing Mach. Co.*, 457 F.2d 1377 (4th Cir.), *cert. denied*, 409 U.S. 982 . . . (1972); *Young v. International Tel. & Tel. Co.*, 438 F.2d 757 (3d Cir. 1971); *Sanders v. Dobbs Houses, Inc.*, 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 . . . (1971); *Waters v. Wisconsin Steel Works of Int'l Harvester Co.*, 427 F.2d 476 (7th Cir.), *cert. denied*, 400 U.S. 911 . . . (1970). *Id.* at 1340.

8. "*See, e.g.*, 42 U.S.C. § 1981 (Civil Rights Act of 1866), 42 U.S.C. § 1983 (Civil Rights Act of 1871)." *Alexander v. Gardner-Denver Co.*, 415 U.S. at 47, n.7 (1974).

Courts, in employment discrimination cases, have granted a broad range of relief under both 42 U.S.C. §§ 1981[9] and 1983[10] including prospective race-conscious relief. This Court also has specifically recognized the availability of prospective race-conscious relief in racial discrimination claims brought under the fourteenth amendment.

In *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), a unanimous Court upheld the district court's finding of racial discrimination in public schools in violation of the Equal Protection Clause of the fourteenth amendment and remedy which included the assignment of students and teachers based upon race. Chief Justice Burger, speaking for the Court, said, "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Id.* at 15. As the Chief Justice made clear in the companion case of *North Carolina Bd. of Educ. v. Swann*, 402 U.S. 43,

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9. Remedial relief under § 1981 has been comprehensive. *Brown v. Gaston County Dyeing Mach. Co.*, 457 F.2d 1377 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972) (back pay); *Harris v. Richards Mfg. Co.*, 675 F.2d 811 (6th Cir. 1982) (compensatory and punitive damages); *Ingram v. Madison Square Garden Center, Inc.*, 709 F.2d 807 (2d Cir.), *cert. denied*, 464 U.S. 937 (1983) (retroactive seniority); *Taylor v. Jones*, 653 F.2d 1193 (8th Cir. 1981) (race-conscious relief); and *Ingram v. Madison Square Garden* (attorney's fees).

10. Equally broad relief has been awarded under § 1983. *Gurmankin v. Costanzo*, 626 F.2d 1115 (3d Cir. 1980), *cert. denied*, 450 U.S. 923 (1981) (back pay); *Gurmankin v. Costanzo*, 556 F.2d 184 (3d Cir. 1977) (retroactive seniority); *Pennsylvania v. O'Neill*, 473 F.2d 1029 (3d Cir. 1973) (en banc); *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971) (en banc), *cert. denied*, 406 U.S. 950 (1972); *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972) (race-conscious relief); *Thomas v. Board of Trustees*, 513 F. Supp. 280 (S.D. Tex. 1981) (attorney's fees).

46 (1971), "[j]ust as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy."

Shortly thereafter, in *Morrow v. Crisler*, 479 F.2d 960 (5th Cir. 1973), a three-judge panel, citing Chief Justice Burger's analysis of a district court's equitable power in *Swann*, affirmed the district court's finding of racial discrimination in hiring by the Mississippi Highway Safety Patrol in violation of the fourteenth amendment and 42 U.S.C. §§ 1981 and 1983. However, the district court had not ordered prospective race-conscious hiring as part of the remedy. Reversing in part, the court of appeals on rehearing *en banc* said:

> [I]t will be incumbent on the District Court to order some affirmative hiring relief. It may, within the bounds of discretion, order temporary one-to-one or one-to-two hiring, the creation of hiring pools, or a freeze on white hiring, or any other form of affirmative hiring relief until the Patrol is effectively integrated. *Morrow v. Crisler*, 491 F.2d 1053, 1056 (5th Cir.) (en banc), *cert. denied*, 419 U.S. 895 (1974).

The race-conscious relief approved by the district court in this case adheres to the guidance in those cases and is consistent with the race-conscious relief awarded by two district court judges in the City's *Shield Club* and *Headen* cases on similar claims. Since the City conceded that "many of the practices used in the past to discriminate against minority applicants for promotion in the Cleveland Division of Fire were substantially similar to those used by the Cleveland Division of Police," Cert. Pet. at A29-30, it was not an abuse of discretion for the district court to evaluate the fairness, reasonableness and adequacy of

the race-conscious relief in this settlement in light of these and similar cases.

The district court took this approach, City Cert. Br. at A3, applied the proper standard, and held that "[t]he January 11, 1983 proposed consent decree is hereby adopted as a fair, reasonable, and adequate resolution of the claims raised in this action." City Cert. Br. at A5.

Reviewing the district court's settlement approval in detail, the court of appeals found no abuse of discretion. *Vanguards*, 753 F.2d at 485.

Since the courts below correctly applied the proper standards and there was no clear abuse of discretion, this Court should affirm.

C. Local 93's status as an intervenor did not confer upon it veto rights over this settlement.

Local 93 suggests that it has veto rights over the Amended Consent Decree because (1) "while Local 93 was granted intervention, it does not appear that there was even the slightest balancing of their interests in the decree," Brief for the Petitioner (Pet. Br.) at 29; and (2) "[t]he lower court made no ruling on the lawfulness of the portions of the decree abrogating seniority rights under the collective bargaining agreement." *Id.* at 30.

Local 93's intervention rights argument is legally insufficient and factually unsupported. The rights of an intervening non-class member employee representative were considered in *Airline Stewards & Stewardesses Ass'n v. American Airlines, Inc.*, 573 F.2d 960 (7th Cir.), *cert. denied*, 439 U.S. 876 (1978). The Seventh Circuit found that the district court's "duty to consider the interests

of the incumbent employees before approving the settlement," *id.* at 964, did not mean that the court

> had a duty to litigate the merits of the plaintiffs' claims prior to approving the settlement. At most the court was required to permit [the union] to intervene and offer it an opportunity to present to the court its members' interests in the proposed remedy. This intervenor had an opportunity to do so. The district court was required to do no more. *Id.*

"Indeed, a rule indiscriminately enabling all intervenors in these cases to veto proposed compromises would seriously hamper efforts to settle Title VII cases [citations omitted], thereby frustrating Congress's expressed preference for achieving Title VII compliance by voluntary means." *Kirkland v. New York State Dep't of Correctional Servs.*, 711 F.2d 1117, 1126 (2d Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984).

An objecting intervenor shoulders the burden of showing "some unusual adverse impact" upon non-class members. *Moore v. City of San Jose*, 615 F.2d 1265, 1272 (9th Cir. 1980). "A simple reduction in non-minority 'expectations' does not necessarily make a consent decree unfair and unreasonable." *Williams v. Vukovich*, 720 F.2d 909, 922 (6th Cir. 1983); *see Franks v. Bowman Transp. Co.*, 424 U.S. 747, 775-78 (1976); *Kirkland*, 711 F.2d at 1126.

Local 93's statement that "it does not appear that there was even the slightest balancing of their interests in the decree," Pet. Br. at 29, is not borne out by the record in this case. Over a period of a year, there were two hearings in which Local 93 fully participated, J.A. 1-3, and over 40 hours of negotiations supervised by a magistrate. J.A. 77. Comparison of the originally

proposed consent decree, J.A. 30-39, with the Amended Consent Decree, Cert. Pet. A29-40, clearly demonstrates that virtually all concessions were in Local 93's favor. Some of the major concessions included reduction of the term of the decree from nine to less than five years, significant increase in the number of promotions, retention of seniority points, and lower minority goals. J.A. 77-84. The Report of Magistrate hardly conveys the impression that Local 93 was ignored.

Finally, Local 93's criticism of the district court is totally inconsistent with its Objections to Consent Decree filed January 26, 1983, J.A. 96-99, in which Local 93 complimented the fairness of the district court. J.A. 97.

Local 93's second argument is equally devoid of factual or legal merit. Despite Local 93's broad reference to "seniority rights," its sole argument relates to "seniority points." The only facts in this record relating to "seniority points" are that they were not in the first proposed consent decree, but at the strong urging of Local 93, seniority points were included in the approved Amended Consent Decree. J.A. 80. There is *absolutely no evidence* that the seniority point system was changed. In fact, Local 93 got exactly what it asked for and now for the first time,[11] in this Court, complains about this issue.

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11. The Memorandum of Understanding between the City and Local 93, effective when the Amended Consent Decree was approved, was never pled, offered into evidence, argued or referred to in this case until the Department of Justice filed an amicus in support of Local 93's motion for rehearing en banc in the United States Court of Appeals for the Sixth Circuit. Even though that court, by order of June 25, 1984, requested the litigants to file briefs discussing the impact, if any, of *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984), on this case, Local 93, in its "Appellant's Supplemental Brief Per Order of June 25, 1984" again did not mention seniority or any "collective bargaining agreement."

The inappropriate, repeated reference by Local 93 and the Department of Justice to a "collective bargaining agreement" in an attempt to give this case a "*Stotts*-look" should similarly fail. As Local 93 well knows, fire promotions were not governed by the then-existing Memorandum of Understanding, but by the Cleveland City Charter and Cleveland Civil Service Commission rules.

In a case in which a union *did* place the collective bargaining agreement before the district court and asserted such rights on the record, the Second Circuit said, "[e]ven if the collective bargaining agreement's provisions gave intervenors a legal right in the existing promotional procedures, such a right would not allow intervenors to veto the settlement unless it also was shown that New York law permitted the authority of the [Civil Service Commission] to be circumscribed by private agreement. *See United States v. Miami*, *supra*, 664 F.2d at 447." *Kirkland*, 711 F.2d at 1128 n.12.[12] As no such showing was made, the court, discounting the "mere expectation of promotion," said, "[t]his interest alone, though it entitles intervenors to be heard on the reasonableness and legality of the agree-

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12. In footnote 8 at page 16 of its Brief, Local 93 says that Ohio Revised Code § 4117.08(A), "(*effective* April 1, 1984 *after the entry of the decree herein*) *makes voluntary changes in a city's promotional policy subject to the collective bargaining process.*" Local 93 fails to acknowledge that Ohio Revised Code § 4117.08 (B) excludes: "[T]he conduct and grading of civil service examinations, the rating of candidates, the establishment of eligible lists from the examinations, and the original appointments from the eligible lists [as] not *appropriate subjects for collective bargaining.*" Section (C) states that without agreement, "nothing in Chapter 4117 of the Revised Code impairs the right and responsibility of each public employer to: . . . *promote* . . ." *Ohio Rev. Code Ann.* § 4117.08 (B)-(C) (Baldwin 1983) (emphasis added). The City has *never* "agreed" with Local 93 to divest the Cleveland Civil Service Commission of its authority over promotional tests and eligible lists.

ment, is not so strong as to require their consent to the agreement." *Kirkland*, 711 F.2d at 1128.

Since Local 93 never offered any evidence relating to a "collective bargaining agreement," Local 93's rights, if any, certainly should not rise to a level higher than those of the union in *Kirkland*. Local 93 was afforded the opportunity to be heard and object to the fairness, reasonableness and adequacy of the Amended Consent Decree. That was all it was entitled to.

II. The Fourteenth Amendment Does Not Preclude the Narrowly Tailored Race-Conscious Relief in This Settlement.

The United States Constitution and implementing federal statutes do not, under the circumstances in this case, preclude prospective race-conscious relief to eliminate the effects of discrimination.

A. A race-conscious remedy may be employed to serve a substantial governmental interest.

The analysis by a majority of Justices on this Court in the *Bakke-Weber-Fullilove* trilogy has led lower courts to the inescapable conclusion that a public employer may utilize race-conscious relief to serve the substantial governmental interest in ameliorating the present effects of past discrimination.

In *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (invalidating medical school's admission policy which reserved a fixed number of class positions for specific minorities), five Justices reversed the California Supreme Court's determination that the Regents' considera-

tion of race violated the Equal Protection Clause of the fourteenth amendment. Justice Powell spoke for this Court, which held that "the State has a substantial interest that legitimately may be served by a properly devised admissions program *involving the competitive consideration of race and ethnic origin*." *Id.* at 320 (emphasis added).

The four concurring Justices (Justices Brennan, White, Marshall and Blackmun) would have upheld the admissions program. Citing Chief Justice Burger's statement in *North Carolina Bd. of Educ. v. Swann*, 402 U.S. 43, 46 (1971), that "so also must race be considered in formulating a remedy," the four Justices wrote:

> Congress . . . clearly desired to encourage all remedies, including the use of race, necessary to eliminate racial discrimination in violation of the Constitution rather than requiring the recipient to await a judicial adjudication of unconstitutionality and the judicial imposition of a racially oriented remedy. *Id.* at 337 (Brennan, J., concurring in part and dissenting in part).

Justice Powell agreed: "The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination." *Bakke*, 438 U.S. at 307. However, in applying the traditional "strict scrutiny" test for racial classifications, he found the admissions program to be constitutionally infirm because of the absence of findings of discrimination. *Id.* at 307-10. He emphasized that "[p]etitioner does not purport to have made, and is in no position to make, such findings." *Id.* at 309.

Subsequently in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), this Court upheld a race-conscious plan between a private employer and a union in which 50% of openings in craft training programs were

allocated to minorities. Weber, a non-minority, challenged the plan under the fourteenth amendment and Title VII. Upholding the plan, a majority of the Court held that Title VII does not prohibit private sector race-conscious plans "to eliminate manifest racial imbalances in traditionally segregated job categories." *Id.* at 197. The criteria applied by this Court were that

> the plan does not unnecessarily trammel the interests of the white employees. The plan does not require the discharge of white workers and their replacement with new black hirees. *Cf. McDonald v. Santa Fe Transp. Co.*, 427 U.S. 273 (1976). Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white. Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance. Preferential selection of craft trainees at the Gramercy plant will end as soon as the percentage of black skilled craftworkers in the Gramercy plant approximates the percentage of blacks in the labor force. *Id.* at 208-09.

Justices Stewart, White, Marshall and Blackmun joined this opinion of the Court by Justice Brennan.

More recently in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), this Court upheld the minority business enterprise 10% set-aside of federal funds for specified minority contractors in state and local government public works projects funded under the Public Works Employment Act of 1977. Non-minority contractors challenged the 10% minority set-aside as denying equal protection under both the fourteenth and fifth amendments, as well as a host of federal civil rights statutes.

Chief Justice Burger, speaking for the Court, said:

> Our analysis proceeds in two steps. At the outset, we must inquire whether the objectives of this

> legislation are within the power of Congress. If so, we must go on to decide whether the limited use of racial and ethnic criteria, in the context presented, is a constitutionally permissible means for achieving the congressional objectives and does not violate the equal protection component of the Due Process Clause of the Fifth Amendment. *Id.* at 473 (emphasis added).

He found a valid objective: "[W]e are satisfied that Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination." *Id.* at 478.

The means were equally valid: "Our review . . . reveals that Congress enacted the program as a strictly remedial measure; moreover, it is a remedy that functions prospectively, in the manner of an injunctive decree." *Id.* at 481. "[W]e reject the contention that in the remedial context the Congress must act in a wholly 'color-blind' fashion." *Id.* at 482.

Although this Court has not considered the question, lower courts upholding local government race-conscious plans regularly cite the *Bakke-Weber-Fullilove* trilogy. In *Bratton v. City of Detroit*, 704 F.2d 878, *modified on reh'g on other grounds*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984), the court upheld, against a challenge by non-minorities, a race-conscious plan adopted by the Detroit Police Department which specified 50% minority hiring and promotion ratios in all ranks until the department was 50% minority, estimated to occur in 1990. The plan was adopted following other lawsuits which established discrimination in hiring and promotion. In its analysis, the court said, "[t]he appellants do not argue in this appeal, nor could it be seriously contended given the numerous judicial determinations on the issue,

that affirmative action plans are *per se* illegal [citations omitted]." *Id.* at 883.

Upholding the plan against the Title VII challenge, the court said, "[w]here a public employer adopts a voluntary affirmative action measure which satisfies the bounds of permissibility gleaned from *Weber*, that employer will be insulated from Title VII liability." *Id.* at 884.

Contrasting the Title VII analysis under *Weber* with the fourteenth amendment analysis under *Bakke* and *Fullilove*, the court reached the same result and said, "it is clear that the [Supreme] Court has chosen to keep the two analyses distinct." *Id.* at 884. The court then held: "Upon careful examination of the plan adopted by the Police Board, we are convinced that it is a valid, legitimate response to this identifiable discrimination and that as implemented it falls within the permissible bounds of Title VII, § 1983 and the Fourteenth Amendment." *Id.* at 901. Other circuit courts have reached the same conclusion.[13] This Court should confirm in this case the lower courts' interpretation and application of the *Bakke-Weber-Fullilove* trilogy.

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13. *See, e.g., South Fla. Chapter of the Assoc. Gen. Contractors of Am., Inc. v. Metropolitan Dade County, Fla.*, 723 F.2d 846 (11th Cir.), *cert. denied*, 105 S. Ct. 220 (1984) (upholding against fourteenth amendment challenge, Dade County Commissioners' ordinance finding discrimination in public contracting and setting aside 100% of one project for minority contractors and 50% of all subcontracts for minorities); *Bushey v. New York State Civil Serv. Comm'n*, 733 F.2d 220 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 803 (1985) (approved Civil Service Commissioner's voluntary adjustment of examination scores to reduce perceived adverse racial impact against minority examinees); *Valentine v. Smith*, 654 F.2d 503 (8th Cir.), *cert. denied*, 454 U.S. 1124 (1981) (upholding, against fourteenth amendment challenge, voluntary faculty hiring program by Arkansas State University using 25% minority hiring goal over four-year period following discriminatory findings by HEW and a federal district court).

B. The valid objective of race-conscious relief in the Amended Consent Decree to remedy the effects of discrimination is uncontested in this case.

As the court of appeals emphasized: "Local 93 does not contest the district court's finding of racial discrimination and thus does not deny the existence of a substantial state interest in some remedial action." *Vanguards*, 753 F.2d at 484.

C. The means used in this case to ameliorate the effects of discrimination were closely tailored to meet this objective.

The court of appeals discussed *Weber* in detail and applied its analysis to the "means" employed by the district court. The court expressly referred to the "modest goals" which "will remain in effect for only four years." *Vanguards*, 753 F.2d at 485.

The prospective race-conscious relief in the Amended Consent Decree was specifically designed to benefit only presently employed minority firefighters who had borne the brunt of the "long history of discrimination against minority persons in the hiring and promotion practices of the City of Cleveland, Division of Fire." Cert. Pet. at A29-30. Although Local 93 baldly asserts that "in the present case, relief is afforded to a class of persons whose identity at the time of judgment was unknown . . . ." Pet. Br. at 10, the record does not support this assertion.

The identity of all the potential beneficiaries of the prospective race-conscious relief was known to the district court at the time the Amended Consent Decree was ap-

proved on January 31, 1983. J.A. 5.[14] The court-approved Notice to Class Members recognized that the Amended Consent Decree applies only to "persons whose rights are or may be affected . . . *who are presently employed* . . . ." Notice to Class Members (filed Jan. 19, 1983) (emphasis added).

As was contemplated by the litigants, the modest effect of the race-conscious plan is borne out by actual promotions to date in the supervisory ranks of the Fire Division. See attached appendix at A-8-10.

The "means" employed in this case were far more limited and less onerous to non-minorities than remedies approved or unquestioned by this Court. *See, e.g., Weber* (50% blacks in new craft training positions until craft workers in plant 39% black); *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984) (validity of underlying consent orders which since 1974 prescribed 50% hiring goals unquestioned by any Justice).

The "means" were far less onerous than those approved by courts of appeals in other cases. *See, e.g., Bratton* (50% hiring and promotion ratios for Detroit police effective until 1990); *South Fla. Chapter of the*

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14. The district court had ordered the City to deliver the notice of settlement to each and every minority firefighter employed by the City at that time. J.A. 3. This was done and an exhibit listing every minority firefighter was filed with the court. *See* Stipulation of Reasonable Service (filed Jan. 28, 1983). Under the Amended Consent Decree, the last examination subject to prospective race-conscious relief was scheduled to be certified on December 15, 1985. Cert. Pet. at A33. In order to take this examination, a candidate had to be employed for at least three years. *Id.* at A32. Therefore, the last date on which a candidate could be appointed and be eligible for the December 15, 1985 test, was December 14, 1982, one month prior to the distribution of notice of proposed settlement to class members.

Assoc. Gen. Contractors of Am., Inc. v. Metropolitan Dade County, Fla., 723 F.2d 846 (11th Cir.), *cert. denied*, 105 S. Ct. 220 (1984) (upholding against fourteenth amendment challenge, County Commissioners' ordinance finding discrimination in public contracting and setting aside 100% of one project for minority contractors and 30% of all subcontracts for minorities).

The "means" were considerably less onerous than those approved in the "Atlanta Plan" which was emphasized by the district court in this case. Apr. Tr. 131-40.[15] That plan was embraced by the International Association of Firefighters Union. *Id. See International Firefighter*, at 6 (Dec. 1979) (Union President McClennan extolling virtues of City of Atlanta firefighter consent decree with one-time minority promotion goals of 50% for Lieutenant and Captain, 35% for Battalion Chief, and long-term goals approximating the racial mix of the work force in those supervisory ranks).

In view of the history of findings of discrimination in this record, there was no constitutional or statutory limitation under the thirteenth and fourteenth amendments or 42 U.S.C. § 1981 or § 1983 which precluded the City from voluntarily formulating a race-conscious plan to ameliorate the effects of the identified discrimination.

Clearly, the filing of the complaint by Vanguards in this case did not in and of itself impose such limitations. Therefore, the fact that such a plan is embodied in the Amended Consent Decree does not make the plan less valid or more subject to legal challenge under these same provisions of the Constitution and federal statutes because it was subjected to prior comprehensive judicial scrutiny.

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15. Transcript of Proceedings held April 27, 1982 ("Apr. Tr.").

III. Title VII Does Not Preclude Race-Conscious Relief in This Case.

While Local 93 does not deny the availability of race-conscious relief in cases brought to remedy the effects of discrimination under the United States Constitution and the century-old Civil Rights Acts, it argues that the remedial provisions of Title VII of the 1964 Civil Rights Act preclude such relief.[16] This contention is unsupported by the legislative history of Title VII and the cases construing that statute.

A. Section 706(g) of Title VII does not preclude race-conscious relief.

In 1972, when Congress amended Title VII to expand coverage to public employees, Congress also amended § 706(g) by adding language to that section confirming that relief includes "any other equitable relief as the court deems appropriate," Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4, 86 Stat. 103, and rejecting language designed to ban race-conscious relief. It is apparent that Congress fully comprehended and intended for class-wide, prospective race-conscious relief to be part of a district court's equitable arsenal to eliminate the effects of discrimination under Title VII.

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16. Taken to its logical extreme, the limitation on the district court's equitable power to remedy institutional discrimination urged by Local 93 and the Department of Justice would elevate § 706(g) to a super constitutional amendment, overriding the thirteenth and fourteenth amendments, repealing 42 U.S.C. §§ 1981 and 1983, and overruling this Court's decisions in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975) and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). Such a radical change in the course of this country's legal progress in eliminating the effects of institutional discrimination should not be lightly inferred from and is certainly not compelled by this Court's decision in *Stotts*.

In 1972, Senator Ervin offered an amendment to Title VII which would have barred "reverse discrimination by employing persons of a particular race," from being required by "any department, agency, officer or employee of the United States . . . ." 118 Cong. Rec. 1661-62 (1972). The manager of the Senate bill, Senator Williams, stated that Ervin's proposal "would strip Title VII of the Civil Rights Act of 1964 of all its fiber." 118 Cong. Rec. 1676 (1972).

Senator Javits, the primary spokesman in opposition, recognized that Ervin's proposal "would deprive the courts of the opportunity to order affirmative action under Title VII of the type which they have sustained in order to correct a history of unjust and illegal discrimination in employment and thereby further dismantle the effort to correct these injustices." 118 Cong. Rec. 1665 (1972). Moreover, Ervin's amendment would "torpedo orders of courts seeking to correct a history of unjust discrimination in employment on racial or color grounds, because it would prevent the court from ordering specific measures which would assign specific percentages of minorities that had to be hired . . . ." 118 Cong. Rec. 1675 (1972).

Senator Ervin's proposed amendment was rejected by a two-to-one margin. 118 Cong. Rec. 1676 (1972). This Court has recognized that defeat of such an amendment, following express consideration of contemporary judicial application of the underlying statute, is a clear indication of legislative intent. *Runyon v. McCrary*, 427 U.S. 160, 174-75 (1975). The courts of appeals have recognized that defeat of Ervin's amendment reflected approval of judicially sanctioned race-conscious remedies to correct past discrimination. *See, e.g., Weber v. Kaiser Aluminum & Chem. Corp.*, 563 F.2d 216, 220-21 (5th Cir. 1977), *rev'd*

on other grounds, 443 U.S. 193 (1979); *EEOC v. American Tel. & Tel.*, 556 F.2d 167, 177 (2d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); *United States v. International Union of Elevator Constructors*, 538 F.2d 1012, 1019-20 (3d Cir. 1976). If there was any confusion over the availability of race-conscious relief in Title VII actions, rejection of the Ervin amendment conclusively resolved it.

By these legislative actions, Congress made clear its intent that federal courts should use the full range of their equitable powers to remedy discrimination.[17]

B. Section 706(g) should not be construed to eradicate the primary purpose of Title VII.

This Court has emphasized the distinction between Title VII's primary purpose of eliminating racial discrimination and its secondary purpose of compensatory or "make whole" relief guaranteed victims. The construction of § 706(g) urged by Local 93 and the Department of Justice not only elevates the secondary purpose of Title VII to pre-eminence, it eliminates the primary purpose.

In *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982), Justice O'Connor recognized that "Title VII's primary goal, of course, is to end discrimination: the victims of job discrimination want jobs, not lawsuits. But when unlawful discrimination does occur, Title VII's secondary, fallback purpose is to compensate the victims for their injuries." *Id.* at 230. In *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), Justice Stewart discussed the "twin statutory objectives" of Title VII which he described as "the central

17. There is no need to duplicate the extensive treatment of legislative history which appears in other briefs. *See, e.g.*, Brief of Respondent Vanguards of Cleveland; Brief of City of Detroit and the District of Columbia as Amici Curiae in Support of Respondent.

statutory purposes of eradicating discrimination throughout the economy *and* making persons whole for injuries suffered through past discrimination." *Id.* at 421 (emphasis added).[18]

These independent purposes and their interrelation with the remedial authority of the district court under Title VII were comprehensively discussed in *Berkman v. City of New York*, 705 F.2d 584 (2d Cir. 1983) (affirming district court order under Title VII that City reserve 45 firefighter positions for women). Discussing the district court's remedial order, the court said:

> The bounds of the court's discretion are set by the purposes of Title VII, which are to prevent discrimination and achieve equal employment opportunity in the future [citations omitted], and to make whole the victims of past discriminatory practices [citations omitted]. *Id.* at 594.

The court then distinguished the district court's remedial powers. "Compliance relief is designed to erase the discriminatory effect of the challenged practice and to assure compliance with Title VII in the future." *Id.* at 595. "Compensatory relief is designed to 'make whole' the victims of the defendant's discrimination." *Id.* (emphasis added). The court then discussed the district court's equitable power to order prospective race-conscious class-wide relief. The court said:

> Affirmative relief is that designed principally to remedy the effects of discrimination that may not be

18. Justice Stewart made clear that "[t]he 'make whole' purpose of Title VII is made evident by the legislative history. The backpay provision was expressly modeled on the backpay provision of the National Labor Relations Act. Under that Act, '[m]aking the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces.' [citations omitted]." *Albemarle*, 422 U.S. at 418.

cured by the granting of compliance or compensatory relief. It may include the setting of long-term hiring targets or the imposition of a requirement that the defendant actively recruit or train members of the Title VII protected group. Such relief may be required where, for example, the defendant has intentionally or egregiously engaged in a practice of discrimination that is likely to have discouraged members of the protected group from becoming members of the applicant pool at any stage. Affirmative relief may also include interim hiring relief that is extended to persons other than members of the plaintiff class and in proportions exceeding the ratio of plaintiff class members to the total applicant pool [citations omitted]. *Id.* at 596.

To engraft the "make whole" victim-specific limitation of compensatory relief onto the district court's equitable power to end institutional discrimination would clearly frustrate the primary purpose of Title VII to eradicate the vestiges of discrimination in the work place.[19] Since "[e]very federal Court of Appeals in this nation has approved remedial use of goals and timetables without requiring that each and every potential eligible person be shown to have been a victim of discrimination,"[20] *Segar*

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19. Not only would such a "stand in line" approach to eliminating the effects of discrimination cling already ever-burdened federal court dockets and substantially increase the cost and time of litigation, it would be viewed by the American people as repudiation of this Court's historic admonition to district courts to use their equitable power to remedy institutional discrimination "with all *deliberate* speed." *Brown v. Board of Educ.*, 349 U.S. 294, 301 (1955).

20. *See Thompson v. Sawyer*, 678 F.2d 257, 294 (D.C. Cir. 1982); *Chisolm v. United States Postal Service*, 665 F.2d 482 (4th Cir. 1981); *United States v. City of Chicago*, 663 F.2d 1354 (7th Cir. 1981); *Ass'n Against Discrimination in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256 (2d Cir.), *cert. denied*, 455 U.S. 988 . . . (1981); *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918 (10th Cir. 1979); *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 . . . (1978); *United States v. International Union of Elevator Constructors, Local 5*, 538 F.2d 1012 (3d Cir. 1976); *Boston Chapter, NAACP, Inc. v. Beecher*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 . . . (1975); *United States v. N.L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973); *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 . . . (1971); *United States v. Int'l Brotherhood of Electrical Workers, Local 38*, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943 . . . (1970). *Segar v. Smith*, 738 F.2d 1249, 1293-94 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 2357 (1985).

(Continued on following page)

v. Smith, 738 F.2d 1249, 1293 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 2357 (1985) (vacating affirmative action order under Title VII on facts), such action would also repudiate the established construction of § 706(g).

Such unanimity of the courts of appeals in interpreting a 21-year-old statute and applying this Court's numerous decisions construing Title VII should not be disregarded.

C. Stotts' interpretation of Title VII does not preclude the prospective race-conscious relief approved by the district court in this case.

The City strongly disagrees with Local 93's argument that *Stotts*, 104 S. Ct. 2576 (1984), compels the conclusion that § 706(g) of Title VII precludes district courts from awarding prospective race-conscious class relief to eliminate the effects of discrimination in employment absent a prior determination by the district court of the quality, nature and degree of discrimination as to each specific victim in the class as well as the particular relief to which each specific victim may be entitled.[21]

Footnote continued—

Segar v. Smith, 738 F.2d 1249, 1293-94 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 2357 (1985).

21. Although § 703(h) was discussed by Local 93, Pet. Br. at 23-24, Local 93 admits § 703(h) does not limit the remedial authority of a district court. *Id.* The Department of Justice agrees. Justice Br. at 5. This Court agrees. *Teamsters v. United States*, 431 U.S. 324, 352 (1977); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 758, 761-62 (1976).

The courts of appeals agree with the City. *Stotts* did not change the consistent interpretation of Title VII. Both Local 93 and the Department of Justice acknowledge, as they must, that since *Stotts*, every court of appeals decision, including the decision in this case, disagrees with their reading of *Stotts*. Pet. Br. at 12; Justice Br. at 17 (between them they list nine court of appeals' opinions, not including this case).[22]

As the court below recognized, a consent order was not at issue in *Stotts* because the district court had entered a preliminary injunction *over the objection of the City*, a party to the pre-existing consent order, to preclude layoffs which the district court held "would have a racially discriminatory effect." *Vanguards*, 753 F.2d at 489 (quoting *Stotts*, 104 S. Ct. at 2582).

The court of appeals also correctly dismissed Local 93's assertion that based upon *Stotts* and *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961), the district court was precluded from approving the settlement in this case. The court below quoted this Court's "statement that 'it is reasonable to believe that the "remedy", which it was the purpose of the decree to provide, would not exceed the bounds of the remedies that are appropriate under Title VII, *at least absent some express provision to that effect*.' *See* [*Stotts*,] 104 S. Ct. at 2586." *Vanguards*, 753 F.2d at 488 (emphasis supplied). As demonstrated above, this settlement does not exceed the bounds of relief under Title VII. However, even if § 706(g) is

22. The courts of appeals are still unanimous. *See Massachusetts Ass'n of Afro-American Police, Inc. v. Boston Police Dep't*, No. 85-1453 (1st Cir. Dec. 20, 1985) (available Jan. 16, 1986, on LEXIS, WESTLAW); *United States v. NAACP*, No. 85-6212 (2d Cir. Dec. 19, 1985) (available Jan. 16, 1986, on LEXIS); *Britton v. South Bend Community School Corp.*, 775 F.2d 794 (7th Cir. 1985).

construed to preclude such relief, this settlement in the form of an amended consent decree includes such relief by its express terms.[23] The settlement in this case expressly provides for limited race-conscious relief.

For these reasons, Title VII does not bar the district court's approval of the settlement in this case.

CONCLUSION

Confronted with a broad array of race discrimination claims brought by the Vanguards in this case, the City evaluated: (1) the litigated history of discrimination, (2) the present effects of that history, (3) its obligations to all of its citizens and firefighters, (4) its desire to operate its Division of Fire free from judicial intervention, (5) its limited financial resources and (6) the risks of continued litigation. Based on this evaluation, and in full compliance with the law, the City voluntarily entered into a fair, reasonable and adequate Amended Consent Decree. It is essential that Cleveland, and every other state and local government, have the option to settle such cases in this manner. As this Court has said, "the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs,

23. The Department of Justice concedes that "private parties wishing to escape the strictures of Section 706(g) can always settle a case on their own terms by filing a stipulation of dismissal under Fed. R. Civ. P. 41(a)(1). Such a disposition 'will not affect . . . third parties or involve the judge in carrying out the underlying settlement.' *Donovan v. Robbins*, 752 F.2d 1170, 1178 (7th Cir. 1985)." Justice Br. at 20 (emphasis added). It is inappropriate for the Department of Justice to advocate such settlements, in this case, in view of the requirement that class action settlements and dismissals be judicially approved. Fed. R. Civ. P. 23(e). The mere fact that plaintiffs file a class action, the preferred means of resolving claims involving a large number of potential plaintiffs, should not constrain the scope of available relief.

consistent with the Constitution." *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977). The district court did in this case. So should this Court. The judgments of the courts below should be affirmed.

Respectfully submitted,

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APPENDIX

CLERK OF COUNCIL

The following Ordinance was passed by the Council of the City of Cleveland April 21, 1980.

Ord. No. 826-80.

By Councilman Forbes (by departmental request).

An emergency ordinance approving the Financial Plan of the City of Cleveland and submitting the same to the Financial Planning and Supervision Commission for the City of Cleveland.

Whereas, the Auditor of the State of Ohio determined on January 4, 1980 that a fiscal emergency condition exists in the City of Cleveland (the "City") under Section 118.03 (A)(1), Ohio Revised Code, as a result of the City's failure to make the required payments on December 15, 1978 on certain Notes which were due and payable on that date; and

Whereas, said determination by the Auditor of the State of Ohio resulted in the establishment of the Financial Planning and Supervision Commission for Cleveland (the "Commission") under Section 118.05, Ohio Revised Code, and gave rise to the requirement under Section 118.06, Ohio Revised Code, that, within ninety days after the first meeting of the Commission, the City submit to the Commission a detailed financial plan (the "Financial Plan") as approved (or amended and approved) by ordinance or resolution of City Council and containing certain elements enumerated under Section 118.06 (A), Ohio Revised Code; and

Whereas, the Commission held its first meeting on January 24, 1980, and the ninety-day period during which the City must submit the Financial Plan expires on April 23, 1980; and

Whereas, this ordinance constitutes an emergency measure providing for the immediate preservation of the public peace, property, health and safety in that it must become effective immediately in order that the Mayor may timely submit the herein approved financial plan to the Commission and that the City of Cleveland may avoid budgetary penalties established by Chapter 118, Ohio Revised Code, for untimely submission, and providing for the usual daily operation of a municipal department; now, therefore,

Be it ordained by the Council of the City of Cleveland:

Section 1. That the purpose of compliance with Sec. 118.06, Ohio Revised Code, the Financial Plan, a copy of which is on file with the Clerk of Council as File No. 006-80, be and it is hereby approved as the official Financial Plan of the City of Cleveland.

Section 2. That the Clerk of Council be and she is hereby authorized and directed to certify a copy of the Financial Plan and a copy of this ordinance and to transmit the same to the Mayor. Further, that the Mayor be and he is hereby authorized and directed to submit the same to the Commission.

Section 3. That this ordinance is hereby declared to be an emergency measure and, provided it receives the affirmative vote of two-thirds of all the members elected to Council, it shall take effect and be in force immediately upon its passage and approval by the Mayor; otherwise, it shall take effect and be in force from and after the earliest period allowed by law.

Passed April 21, 1980.

Effective April 23, 1980.

I, Mercedes Cotner, Clerk of Council of the City of Cleveland, do hereby certify that the foregoing is a true and correct copy of Ordinance No. 856-80 passed by the Council of the City of Cleveland, April 21, 1980, effective April 23, 1980.

WITNESS my hand and seal at Cleveland, Ohio, this 21st day of January, 1986.

/s/ MERCEDES COTNER
Clerk of Council

THE FINANCIAL PLAN OF THE CITY OF CLEVELAND

B. Prior Year Net Liabilities and Deficits

Immediately upon taking office in November, 1979, the Mayor commissioned a special study of the assets and liabilities of the City treasury account. The study was conducted by a team of accountants loaned by local accounting firms and businesses under the leadership of Ernst & Whinney. That study concluded that as of November 11, 1979 the treasury account had $110,509,366 more in outstanding liabilities than it had in available assets. In addition, there was $7,600,000 in bond anticipation notes outstanding which were not part of the scope of the study. The bulk of these liabilities were restricted funds which had been spent for operating purposes, accrued wages and benefits, funds due to other governments, accounts payable to vendors, and the total $36,215,000 in bond anticipation notes which needed to be either repaid or refinanced. At that time, $28,615,000 of the notes had reached maturity.

Financial Plan of City of Cleveland, at 9 (April 1980) (approved by Cleveland, Ohio Ord. No. 156-80 (April 21, 1980)).

CLERK OF COUNCIL

The following Ordinance was passed by the Council of the City of Cleveland December 2, 1985.

Ord. No. 2826-85.

By Councilman Forbes (by departmental request).

An emergency ordinance to transfer the sum of three million dollars ($3,000,000) from the Restricted Income Tax Fund to eliminate in part the past deficit in the Motor Vehicle Maintenance Fund.

Whereas, the City has been subjected to the provision of Chapter 118, Ohio Revised Code, by the determination of the Auditor of State, State of Ohio, that a fiscal emergency condition exists in the City pursuant to Section 118.03 and 118.04, Ohio Revised Code; and

Whereas, this ordinance constitutes an "appropriation measure" as defined in Section 118.01(B), Ohio Revised Code; and

Whereas, Section 118.03(A), Ohio Revised Code, requires that any appropriation measure, prior to approval by Council, must be submitted to the Financial Planning and Supervision Commission, the Financial Supervisor, for review to determine whether the measure is consistent with the City's Financial Plan; and

Whereas, in accordance with Section 41 of the Charter, the Mayor has recommended in writing the within transfer; and

Whereas, this ordinance constitutes an emergency measure providing for the usual daily operation of a municipal department; now, therefore,

Be it ordained by the Council of the City of Cleveland:

Section 1. That, for the reasons set forth in the preamble hereto, this ordinance is subject to the review of the Commission or, when authorized by the Commission, the Financial Supervisor, and that the Council may not approve this ordinance unless and until the Commission or the Financial Supervisor notifies the Clerk of Council in writing that this ordinance has been determined to be consistent with the City's Financial Plan.

Section 2. That, for the purpose of eliminating in part the deficit existing in the Motor Vehicle Maintenance Fund as of December 31, 1979, pursuant to Chapter 118, Ohio Revised Code, the sum of three million dollars ($3,000,000) be and the same is hereby transferred from the Restricted Income Tax Fund, Fund No. 10 SF 006, to the Motor Vehicle Maintenance Fund, Fund No. 70 SF 300. Further, that the sum so transferred shall not be reflected on the records of the City as increasing the resources available for appropriation in the transferee fund.

Section 3. That this ordinance is hereby declared to be an emergency measure and, provided it receives the affirmative vote of two-thirds of all the members elected to Council, it shall take effect and be in force immediately upon its passage and approval by the Mayor; otherwise it shall take effect and be in force from and after the earliest period allowed by law.

Passed December 2, 1985.

Effective, December 6, 1985.

I, Mercedes Cotner, Clerk of Council of the City of Cleveland, do hereby certify that the foregoing is a true and correct copy of Ordinance No. 2656-85 passed by the

Council of the City of Cleveland, December 2, 1985, effective December 6, 1985.

WITNESS my hand and seal at Cleveland, Ohio, this 21st day of January, 1985.

s/ Mercedes Cotner
Clerk of Council

Summary of Promotions
Under Amended Consent Decree
2/11/83 to 12/31/85

	Non-Minority	Minority	Total	Minority Percentage
I. 1983 Eligible List				
A. February 10, 1983				
Assistant Chief	2	2	4	
Battalion Chief	13	3	16	
Captain	29	3	32	
Lieutenant	33	33	66	
Total	77	41	118	34.7%
B. May 23, 1983				
Battalion Chief	6	0	6	
Captain	16	0	16	
Lieutenant	33	0	33	
Total	55	0	55	0.0%
C. December 24, 1983				
Lieutenant	5	0	5	
Total	5	0	5	0.0%
D. March 17, 1984				
Assistant Chief	1	0	1	
Battalion Chief	3	0	3	
Captain	5	0	5	
Lieutenant	5	0	5	
Total	14	0	14	0.0%
E. May 18, 1984				
Battalion Chief	1	0	1	
Total	1	0	1	0.0%

	Non-Minority	Minority	Total	Minority Percentage
F. 1983 Eligible List Summary				
Assistant Chief	3	2	5	
Battalion Chief	23	3	26	
Captain	50	3	53	
Lieutenant	76	33	109	
Total	152	41	193	21.2%
II. 1984 Eligible List				
A. May 25, 1985				
Assistant Chief	1	0	1	
Battalion Chief	1	1	2	
Captain	5	5	10	
Lieutenant	7	2	9	
Total	14	8	22	36.4%
B. July 18, 1985				
Captain	1	0	1	
Lieutenant	7	0	7	
Total	8	0	8	0.0%
C. 1984 Eligible List				
Assistant Chief	1	0	1	
Battalion Chief	1	1	2	
Captain	6	5	11	
Lieutenant	14	2	16	
Total	22	8	30	26.7%
III. 1983 and 1984 Eligible List Summary				
Assistant Chief	4	2	6	
Battalion Chief	24	4	28	
Captain	56	8	64	
Lieutenant	90	35	125	
Total	174	49	223	22.0%

Division of Fire Personnel Distribution
December 31, 1985

	Non-Minority	Minority	Total	Percentage
Chief	1	0	1	0.0%
Assistant Chief	4	1	5	20.0%
Battalion Chief	21	5	26	19.2%
Captain	60	5	65	7.7%
Lieutenant	126	27	153	17.6%
Subtotal	212	38	250	15.2%
Firefighters	548	151	699	21.6%
Total	760	189	949	19.9%

RESPONDENT'S

BRIEF

Supreme Court, U.S.
FILED
JUL 31 1998

No. 96-1999

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, C.L.C.,
Petitioner,

v.

CITY OF CLEVELAND, *et al.*,

and

VANGUARDS OF CLEVELAND,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF RESPONDENT THE VANGUARDS OF CLEVELAND

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QUESTION PRESENTED

Whether the District Court abused its discretion under Title VII, Section 1981 and the Fourteenth Amendment in approving a voluntarily adopted consent decree which is the equivalent of a voluntary affirmative action plan and which includes a modest race-conscious remedy carefully tailored to remedying past discrimination and preventing future discrimination.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1999

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, C.L.C.,
Petitioner,

v.

CITY OF CLEVELAND, *et al.*,

and

VANGUARDS OF CLEVELAND,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENT THE VANGUARDS OF CLEVELAND

OPINIONS AND JUDGMENTS BELOW

Respondent, the Vanguards of Cleveland, is satisfied with Petitioner's Statement except that the opinion of the district court is reproduced in the Appendix to the City of Cleveland's Brief in Opposition to Petition for Certiorari. (City App. A1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved are set forth in the Brief of Petitioner and the Brief of Respondent City of Cleveland.

STATEMENT OF THE CASE

On October 23, 1980, the Vanguards of Cleveland (the "Vanguards"), an organization of minority firefighters employed by the City of Cleveland Fire Department, filed a class action complaint alleging discrimination by the city in the hiring, promotion and assignment of firefighters. The complaint alleged intentional violations of the Thirteenth and Fourteenth Amendments, Title VII of the 1964 Civil Rights Act and 42 U.S.C. §§ 1981 and 1983.

The complaint was filed as the result of long-standing and continuing discrimination against minorities by the Cleveland Fire Department and followed several years of litigation involving discriminatory hiring by the city.[1]

[1] *Headen v. City of Cleveland*, No. C73-330 (N.D. Ohio 1973) resulted in a judicial finding of unlawfully discriminatory entrance examinations in 1973 (Df's Exh. 15E); an order enjoining any further hiring pending the development of job-related entrance examinations, recruitment plans and revised screening procedures in 1975 (Df's Exh. 15B); and judicial approval of a plan in 1977 governing future hiring. (Df's Exh. 15D, 15C). The remedy requires the appointment of minorities in a proportion not less than the proportion of minorities passing any given entrance examination.

The findings in the *Headen* litigation are supported by similar findings involving the Cleveland Police Department in *Shield Club v. City of Cleveland*, 370 F. Supp. 251 (N.D. Ohio 1972). Entrance examinations for the police and fire departments were previously identical. (Df's Exh. 15B). In *Shield Club*, post-entrance examination screening procedures, promotion examinations, the use of "seniority" or "prior service" credits and assignment practices were all found to be discriminatory and unlawful. See *id.*, 8 E.P.D. ¶¶ 9606, 9614 (N.D. Ohio 1974); *id.*, 14 E.P.D. ¶ 7763 (N.D. Ohio 1976).

References to the Joint Appendix will be cited as (J.A. ——). Local 93's Petition for a Writ of Certiorari includes the amended consent decree and the opinion of the court of appeals and will be cited as (Pet. App.). The City of Cleveland's Brief in Opposition reproduces the opinion of the district court and will be cited as (City App.). The City of Cleveland's Brief on the Merits contains an appendix which will be cited as (Br. of City, App.). The Vanguards' appendix will be cited as (Vang. App.).

The Vanguards charged that the city had intentionally restricted minority access into the fire department for decades, using discriminatory entrance examinations and background checks conducted by the virtually all-white police department and other "screening" procedures. Physical requirements and medical standards which were strictly enforced against minorities were commonly ignored for whites.[2] (J.A. 10)

The plaintiff alleged that minorities who were permitted to join the department were not treated as equals. Instead they were restricted to certain geographical areas of the city (specifically the black community) and were denied jobs in the specialized units such as the fire alarm office and the fire prevention bureau. *Id.* At their station houses minorities were excluded from meal clubs and were denied other privileges that whites enjoyed; they were ordered to perform demeaning chores which were

[2] The first minority knowingly hired by the department was James A. Gay in 1943. (Tr., 124-25) Had this case proceeded to trial on the merits the Vanguards would have established that Mr. Gay was actually preceded by Harvey Burns who "passed" as white. When it was discovered that Mr. Burns had black relatives, he was stripped of his duties as a firefighter and was permanently reassigned to the "ash truck", picking up debris from the firehouses and delivering it to the city dump.

The city permitted minorities to trickle into the department during the 1940's, 1950's, and 1960's. There were numerical limits placed on minority access to the department, depending upon vacancies in the few "integrated" houses and the willingness of the white houses to receive minorities. Minorities were commonly turned down during their medical examinations for traits which did not bar whites, e.g., "flat feet", "nostrils too large" (alleged smoke danger), "too tall" or "too short." Some minorities tried as many as six times to get into the fire department. Rejected applicants were told unabashedly by fire officials: "we're only taking two this year." By 1966 there were 48 minorities in the department, 3.5% of the total number of firefighters. (J.A. 165). By contrast, blacks alone constituted 42% of the non-public safety employees of the city. Hearings before the United States Commission on Civil Rights, Cleveland, Ohio, p. 797 (1966).

not assigned to whites. *Id.*[3] Promotions were systematically denied to minorities by methods which included the manipulation of retirement dates and the use of discriminatory promotion examinations. *Id.*[4]

In 1982 there were only ten minorities holding supervisory positions in the Cleveland Fire Department.[5] These ten minorities constituted a mere 4.5% of all such positions in the department. (J.A. 106) By contrast, the percentage of minorities residing in the City of Cleveland

[3] On July 30, 1975 the Ohio Civil Rights Commission found that "[n]o blacks are assigned or transferred to the [almost all white] West Side, thus creating a segregated workforce." State of Ohio, Civil Rights Commission, Notice of Commission Determination, Case No. NE 4-75-5427 (July 30, 1975). In addition, the Vanguards would have established that blacks were assigned to "black" beds in their firehouses, meaning that a black on first shift shared a bed with blacks on the second and third shifts. If there were no minorities on the second or third shift, the bed stood empty. Minorities were kept out of the meal clubs and the coffee clubs and were denied access to the recreation rooms. The worst chores, such as scrubbing the kitchen, were reserved for minorities despite the presence of less senior white firefighters.

[4] Promotions have historically been based upon an examination which allegedly reflects the "content" of a reading list. The Vanguards would have established that white firefighters were encouraged to study for promotional examinations on the job while minorities were discouraged by comments from their white supervisors and by assignment to numerous tasks at examination time. Until the late 1960's whites convened in regular classes with instructors to prepare for promotional examinations. These classes were closed to minorities.

There has long been a custom and practice in the department of timing one's retirement in order to enable a friend or colleague who holds a place on an eligible list to secure a promotion. Whites are unwilling to "go out" (i.e., retire) for minorities, therefore minorities have frequently found themselves standing at or near the top of an eligible list at the time the list expires.

[5] The supervisory ranks of the Cleveland Fire Department consist of the ranks of lieutenant, captain, battalion chief, assistant chief and chief.

in 1982 was in excess of 47%.[6] Twenty-five percent of all white firefighters employed by the fire department held supervisory positions. Yet only seven percent of the minorities employed by the department held similar positions. (J.A. 107) During the three promotion periods immediately preceding the filing of the Vanguards complaint, non-minorities had a likelihood of being promoted which was two and one-half times that of minorities for the rank of lieutenant (J.A. 120) and twice that of minorities for the rank of captain. (J.A. 121)

In 1973, orders in the *Headen* case resulted in the largest influx of minorities in the history of the department. However, the city then manipulated the promotion process to deny these new recruits the opportunity to compete for promotions. Instead of administering promotional examinations at regular intervals, the city refused for the extraordinary period of six and one-half years to schedule any promotional examinations.[7] It continued to promote on the basis of the virtually all-white 1975 eligible list, with the net result that whites with low scores on the 1975 examination were promoted, yet only three of 108 promotions to the rank of lieutenant went to minorities. (J.A. 120)

The City of Cleveland was fully aware of its long history of discrimination and consequently opened negotiations in an effort to resolve the litigation. In November, 1981, a compromise settlement was agreed upon by the plaintiff and the city. (J.A. 39) Likewise in November, 1981, the city administered promotional examinations for the first time since April, 1975. However, as with previous promotional examinations, these examinations were developed in haste and were of doubtful valid-

[6] The minority percentage in the fire department in 1982 was 14%.

[7] Eligible lists are normally effective for no more than two years. (J.A. 89)

ity. The district court ordered that these examinations remain ungraded and that the answer sheets be impounded. (J.A. 41-42)

During the period that the first proposed decree was being negotiated, Local 93 of the International Association of Firefighters ("Local 93") intervened in the litigation. (J.A. 24) When Local 93 objected to the first proposed consent decree, the district court scheduled a hearing on its objections and accorded Local 93 full pretrial discovery rights.

The evidentiary hearing was begun on January 7, 1982. On January 8, the district court adjourned this hearing, directing the parties to try to reach a tripartite settlement with Local 93. On the first of several such occasions, the district court applied considerable pressure on the city to create more promotional opportunities to accommodate the interests of minorities and non-minorities alike.[8] (J.A. 32-38)

Evidentiary hearings were resumed on April 27-28, 1982. The court renewed its pressure on the city to create more supervisory positions. (City App. A2) The following day Local 93 made a proposal for a race-conscious approach which tracked the trial court's views and which ultimately led to the resolution of the lawsuit. Based on this proposal, a tripartite agreement on a revised affirmative action plan was reached among the plaintiff, the defendant and the leadership of Local 93. Local 93's concurrence was subject only to ratification by its membership.

When Local 93's membership declined to ratify the settlement, the plaintiff and the city submitted an amended consent decree which was virtually identical to the plan approved by Local 93's leadership. Local 93 objected,

[8] Although numerous discussions were held in the interim, Local 93 refused to consider any affirmative relief, but instead advocated use of a training program. (J.A. 169)

stating its "absolute and total opposition to the use of racial quotas," but acknowledged the substantial concessions it obtained during the negotiation process. (J.A. 96-98) Local 93 was again extended the opportunity to submit evidence and argument in support of its objections.[9] On January 31, 1983 the amended consent decree was approved by the district court.

The amended consent decree reflects the guidance of the trial court and the important concessions made to Local 93. The central feature of the new plan was the creation of almost twice as many promotional opportunities for firefighters of all races. Rather than shift the burden of the remedy to non-minorities by denying them promotions, the city agreed to bear the cost of the remedy by creating and funding new supervisory positions. As illustrated by the figures reproduced in the appendix, the city's agreement to fill more supervisory positions meant that non-minority candidates obtained more promotions under the decree than they would have secured in the absence of the decree. Also, at the urging of Local 93, use of prior service credits was restored as a factor in ranking candidates for promotion and the life of the decree was shortened to less than five years. In addition, unlike most employment discrimination settlements, the City of Cleveland expressly admitted that "there has been a long history of discrimination against minority persons in the hiring practices and the promotion practices of the City of Cleveland Division of Fire," and that "prior litigation . . . has failed to effectively eliminate the present effects of such discriminatory practices." (Pet. App. A29)

At the time the consent decree was entered, no promotions had been made for over two and one half years and no new eligible lists had been certified for over eight

[9] Local 93 made no effort to rebut the inferences of discrimination from the evidence introduced by the plaintiff. Local 93 produced only one witness at the trial court level and introduced no exhibits.

years. It was in the interest of all the parties to go forward with immediate promotions. Accordingly, the decree was structured to require immediate promotions from the 1981 examination, followed by the development and administration of new examinations shortly thereafter.

The decree required that 66 lieutenant positions and 52 upper level positions be filled immediately from among the individuals who passed the unvalidated 1981 examination. For the lieutenant rank—the entry level supervisory positions, because of the city's past discrimination, only be promoted on an alternating basis. For upper level positions, because of the city's past discrimination, only ten minority individuals had been eligible to take the 1981 examination. The decree thus required that each of the minority individuals who passed the 1981 examination for upper level jobs would be promoted.

For the future, the decree required that job-related promotional examinations be developed and administered according to a fixed timetable. This schedule was designed to permit the decree to expire at the earliest possible date. The decree also set goals for the appointment of minorities from the next two examinations. These goals were based on the projected percentage of minorities in each rank as a result of the initial group of promotions [10] and were designed to provide a remedy for the upper ranks

[10] As a result of the initial round of minority promotions in February of 1983, the minority percentages in each rank were as follows: lieutenant (22%), captain (5%), battalion chief (12%), assistant chief (40%). (Br. of City, App.) During the succeeding two eligible lists, the agreement provides that, whenever possible, promotions should be made so as to achieve the following levels of minority participation:

	Lieutenant	Captain	Battalion Chief	Assistant Chief
1984 List	23%	10%	10%	20%
1985 List	25%	20%	20%	20%

which remained virtually all white even after the February, 1983 promotions. In addition, the 1984-87 goals were designed to minimize any adverse impact from the 1984 and 1985 examinations.[11]

The bulk of the minority promotions envisioned under the decree were made immediately on February 10, 1983. An analysis of promotions from the 1981 examination discloses that not a single non-minority has been denied a position he would have received in the absence of the decree. Whereas the city had intended to promote no more than 40 individuals to the rank of lieutenant from the 1981 examination, under the decree it made 109 such promotions, 76 of which went to non-minorities. (Vang. App. 1a)

The benefits of the decree to non-minorities were even greater for upper level supervisory ranks. The decree required the city to make a minimum of 52 immediate promotions to these ranks (Pet. App. A4), whereas in the absence of the decree the city would have made only 33 such promotions. Only eight of these upper rank promotions went to minorities. The city made a total of 83 promotions to the upper ranks from the 1981 examinations, of which 76 went to non-minorities. (Vang. App. 1a). In fact, non-minorities gained at least 44 upper level promotions as a result of the decree.[12]

[11] By fixing remedial goals keyed to the percentage of minority participation by rank, and by scheduling two additional promotion periods within the life of the decree, the 1984-87 goals were designed to break down the effects of past discrimination in the upper ranks without skipping ranks.

[12] Since the immediate group of promotions in February, 1983, only eight, or seven percent, of all promotions have gone to minorities. The results of the 1984 examination had a significant adverse impact on minority candidates and even utilizing the affirmative action measures included in the decree, the goals set by the decree for the second round of promotions were not met. For example, 242 individuals took the lieutenant's examination in 1984. Of the

The district court approved the amended consent decree only after making express findings that "the documents, statistics and testimony presented at the January and April, 1982 hearings reveal an historical pattern of racial discrimination in promotions within the Cleveland Fire Department" and only after making further findings that the limited race-conscious relief embodied in the plan is reasonably tailored to remedying the past history of discrimination. (City App. A3-5) These findings of discrimition are clearly supported by the record, and were not appealed by Local 93.[13]

During the life of the amended consent decree, Local 93 lodged an appeal with the Court of Appeals for the Sixth Circuit. Following the decision of this Court in *Firefighters Union No. 1784 v. Stotts*, 467 U.S. 561, 104 S. Ct. 2576 (1984), additional briefs were submitted on the effect, if any, of the *Stotts* decision on the intervenor's appeal. The court of appeals affirmed the judgment of the district court and denied Local 93's request for a rehearing *en banc*. The Court granted a writ of certiorari on October 7, 1985.

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182 non-minorities, 37 (20%) passed the examination. Of the 60 minorities, only 2 (3%) passed the examination.

Promotions from the 1985 examination have been stayed by the consent of all parties pending the Court's decision. That examination also had a severe adverse impact on minorities. As in 1984, only 2 minorities (3%) passed the lieutenant's examination. Fifty (approximately 30%) of the non-minority candidates passed the same examination.

[13] The remedial aspects of the amended consent decree have, for the most part, had their intended effect. The minority percentage in the upper ranks of the Cleveland Fire Department has risen from less than 5% in January of 1983 to 15% at present. (Br. of City, App.) The decree requires that the next group of promotions include the two minority lieutenants and the five minority captains who passed the 1985 examination and one minority battalion chief. Since promotions have been stayed by agreement of the parties and numerous retirements are expected, the next group of promotions is again likely to include large numbers of non-minorities.

SUMMARY OF ARGUMENT

The dominant characteristic of the consent decree under review in this case is its reasonableness. The consent decree's affirmative action plan was voluntarily adopted and includes a modest race-conscious remedy which is carefully tailored to achieving the goals of remedying judicial findings of past discrimination and preventing future discrimination. The plan falls comfortably within the limits of acceptable race-conscious affirmative action set forth in *Bakke*, *Weber* and *Fullilove*. Consistent with the Congressional objective that voluntary measures be utilized to remedy discrimination whenever possible, this consent decree should be viewed as the equivalent of a plan adopted by the city independent of this litigation. Since Local 93 does not challenge the propriety of purely voluntary race-conscious remedies on this record, the Court should affirm.

Alternatively, it is clear that Congress has authorized the federal courts to fashion race-conscious remedies under Title VII when such remedies are implemented "[to] eliminate the discriminatory effects of the past as well as [to] bar like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154 (1965). As recognized in the prior decisions of this Court and as supported by the legislative history of Title VII, Congress has steadfastly refused to permit the use of inflexible "quotas" to maintain racial balance but has clearly authorized the federal courts to adopt flexible numerical *remedies* when, as here, such remedies are necessary to correct past discrimination or prevent future discrimination. Moreover, this consent decree is entirely consistent with the statutory objectives of Title VII. Therefore under Title VII, as well as under the alternative bases for the relief approved by the district court and the court of appeals, the decision of the court of appeals should be affirmed.

ARGUMENT

I. THE CONSENT DECREE SATISFIES THE STANDARDS FOR VOLUNTARY RACE-CONSCIOUS REMEDIES UNDER TITLE VII AND THE FOURTEENTH AMENDMENT.

A. The Criteria Established In Prior Decisions.

On three previous occasions, the Court has been called upon to articulate criteria for acceptable race-conscious affirmative action. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978);[14] *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979);[15] and *Fullilove v. Klutznick*, 448 U.S. 448 (1980).[16] These historic cases

[14] These three decisions are of overriding significance in the instant case. Yet in view of the exhaustive treatment which the *Bakke/Weber/Fullilove* trilogy has received from the commentators, the amici and others, the Vanguards will confine its discussion of these decisions to the margin.

In *Bakke*, Justice Brennan, joined by Justices White, Marshall and Blackmun, held that the goal of remedying past societal discrimination is a constitutionally permissible goal of a voluntary affirmative action plan. These four members of the Court had little difficulty in concluding that the medical school's admissions program was reasonably fashioned towards the attainment of this goal:

> When individual measurement is impossible or extremely impractical, there is nothing to prevent a State from using categorical means to achieve its ends, at least where the category is closely related to the goal . . . . [S]pecific proof that a person has been victimized by discrimination is not a necessary predicate to offering him relief where the probability of victimization is great.

438 U.S. at 377, 378.

Justice Powell reviewed prior decisions of the Court in the areas of voting rights, school desegregation and employment discrimination. He concluded that when preceded by findings of constitutional or statutory violations by a competent judicial, legislative or administrative body, racial classifications which aid "persons perceived as members of relatively victimized groups at the expense of other innocent individuals" vindicate a legitimate and substantial interest of the State and if reasonable in scope, are fully consistent with the Fourteenth Amendment. Declining to elaborate in detail on the outer limits of such race-conscious remedial plans, Justice

Powell observed that "[in] such . . . case[s] the extent of the injury and the consequent remedy will have been judicially, legislatively, or administratively determined [and] . . . the remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit." 438 U.S. at 307, 308.

The context and the language of Justice Powell's remarks make it clear that his reference was to persons "perceived as victims of [a] relatively victimized group" as opposed to "proven victims" as that term is used by Local 93. The beneficiaries of a school desegregation order are not proven victims of prior discrimination, yet they are the legitimate beneficiaries of race-conscious relief ordered following a finding of "identified discrimination." 438 U.S. at 307-09. *Cf. Stotts*, 467 U.S. at ——, 104 S. Ct. at 2593 (O'Connor, J.).

[15] The second case in the trilogy arose under Title VII. In *Weber*, a five member majority of the Court upheld a race-conscious affirmative action plan even though it benefitted persons who had not been individually proven to be victims of prior discrimination. Although the Court declined to "define in detail the line of demarcation between permissible and impermissible affirmative action plans," 443 U.S. at 208, the Court identified three reasons why the Kaiser plan was permissible: (1) the plan was clearly remedial in character, "designed to break down old patterns of racial segregation and hierarchy"; (2) the plan did not "unnecessarily trammel" the interests of white employees; and (3) the plan was a "temporary measure", intended to eliminate rather than to maintain racial imbalance. 443 U.S. at 208. These three criteria have since become the benchmark by which the lower courts have evaluated race-conscious relief—whether voluntarily agreed to or judicially imposed. *See e.g., Bratton v. City of Detroit*, 704 F.2d 878, 883-84 (6th Cir. 1983), *modified on other grounds*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

[16] Six members of the Court joined in essentially two groupings in *Fullilove*. The Chief Justice, joined by Justices White and Powell, indicated that the Court was rejecting "the contention that in the remedial context the Congress must act in a wholly 'color-blind' fashion." 448 U.S. at 482. The Chief Justice cautioned that just as a "federal court is required to tailor the scope of the remedy to fit the nature and extent of the violation", 448 U.S. at 483, so too "any congressional program that employs racial or ethnic cri-

evidence a consistency of approach and collectively create a framework for evaluating the race-conscious affirmative relief approved in this case.

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teria to accomplish the objective of remedying the present effects of past discrimination [must be] narrowly tailored to the achievement of that goal." 448 U.S. at 480. The MBE program was not rendered unconstitutional merely because it had the effect of denying contracts to non-minority businesses who may have been innocent of any prior discriminatory actions. "It is not a constitutional defect in this program that it may disappoint the expectations of non-minority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible." 448 U.S. at 484. Similarly the MBE program was not unconstitutional simply because it "bestow[ed] a benefit on businesses identified by racial or ethnic criteria which cannot be justified . . . as a remedy for the present effects of identified prior discrimination", 448 U.S. at 486; rather the MBE program was upheld because it provided a "reasonable assurance that application of racial or ethnic criteria [would] be limited to accomplishing the remedial objectives of Congress . . ." 448 U.S. 487.

Justice Powell concurred separately to conform his analysis of the MBE program to his opinion in *Bakke*. Justice Powell analogized the discretion accorded Congress for the redress of racial discrimination under the Thirteenth and Fourteenth Amendments to the discretion accorded a trial court to engage in "a balancing process . . . within appropriate constitutional and statutory limits" when it orders or approves "an affirmative remedy for [the] redress of racial discrimination." 448 U.S. at 508. He found the factors relied upon by the courts of appeals in reviewing the permissible scope of race-conscious hiring remedies to be appropriate guidelines: (1) "the efficacy of alternative remedies"; (2) "the planned duration of the remedy"; (3) "the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force"; and (4) "the availability of waiver provisions if the hiring plan could not be met." 448 U.S. at 510-11. In addition, a further factor should be considered, "the effect of the set-aside upon innocent third parties." *Id.* at 514. Finally, he noted that a race-conscious program such as this should, given its impact on innocent persons, be perceived as fair and just. 448 U.S. at 506, n.8.

Justice Marshall, joined by Justice Brennan and Blackmun, agreed that the 10% minority set-aside in *Fullilove* was constitutional. While Justice Stevens dissented, he clearly acknowledged the legitimacy—under proper circumstances—of race-conscious affirmative action by a legislative body. Justice Stevens objected to what he perceived as the severe over-inclusiveness of the classification, 448 U.S. at 540, and Congress' failure to utilize a fair and deliberative process in choosing means to achieve its remedial goal. 448 U.S. at 551.

As the comments in the margin illustrate, there are common elements which permeate the standards for review of race-conscious affirmative action. Of these elements, at least five factors appear to be critical. First, the plan must be remedial in character, designed to ameliorate, or eliminate if feasible, the disabling effects of past discrimination. Alternatively, the plan must be designed to prevent discrimination or must serve other important governmental interests.[17] Second, the scope of the chosen remedy must bear a reasonable relationship to the magnitude of the discrimination sought to be corrected. Third, the plan must exhibit the dual attributes of temporariness and flexibility. Fourth, while third parties can be expected to absorb some of the burdens of the plan, the plan must take care to minimize such burdens whenever feasible and may not unnecessarily trammel third party interests. Finally, the plan as a whole must be fair and reasonable.

B. The Consent Decree In This Case Is A Reasonable Means To Remedy Past Discrimination And Prevent Future Discrimination.

It has long been established that discrimination remedies must "so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States*, 380 U.S. at 154. Consequently, the initial inquiry is whether the goals of the plan serve remedial or preventative purposes or other important governmental interests. This affirmative action plan is clearly designed to ameliorate "identified" past discrimination, to prevent future discrimination and

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[17] *See, e.g., Bakke*, 438 U.S. at 311-12 (Powell, J.).

to simultaneously serve other substantial governmental interests.

The City of Cleveland admitted and the district court found "a long history of discrimination against minority persons in the . . . promotion practices of the Cleveland Fire Department." (Pet. App. A29; City App. A3-A4).[14] As a result of this painful history of discrimination, in January of 1983 there were only eight minorities in the supervisory ranks of the department serving a city whose population is nearly fifty percent minority. As found by the district court, both aspects of the amended consent decree—the initial group of mandatory promotions and the follow-up short term goals—are clearly designed as remedial measures to achieve the goal of dismantling, at least in part, this legacy of discrimination. (City App. A4) Thus one purpose of the decree was to create a supervisory force that resembles the force that would have existed in the absence of discrimination.[15] See Part II.C.1. below.

The amended consent decree also serves the objective of providing a further remedy for discrimination in hiring and a remedy for discrimination in assignments. The current lawsuit was brought because prior litigation had "failed to effectively eliminate the present effects of [past] discriminatory [hiring] practices." (Pet. App. A29) Promotion discrimination was integrally related to plaintiffs' claims of continuing discrimination in hiring.[16]

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[14] The City of Cleveland, as well as the district court, is competent to make findings of past discrimination and the remedial measures needed. *Bakke*, 438 U.S. at 307-10 (Powell, J.).

[15] The short term goals contained in paragraph 13 of the plan (Pet. App. A35) are also geared toward achieving this objective. See n.—— above.

[16] Previous litigation over hiring practices had resulted in a remedy under which the percentage of minorities hired was largely dependent on their representation in the applicant pool. The plaintiff was given a key role in recruiting minority applicants. The Vanguards found such recruitment difficult, not surprising in view

Likewise, promotion discrimination was integrally related to discrimination in assignments[17] and by increasing the number of minority supervisors a remedy was fashioned to effectively combat this long-standing practice.[18]

Finally, the remedy agreed to by the plaintiff and the defendants serves the important goals of preventing future discrimination in promotions (see Part II.C.2 below)[19] and enabling the city to meet the all-important

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of the department's reputation of discrimination, the absence of minority supervisors and the perceived lack of promotion opportunities. Minority recruitment climbed from 20% in 1977 to 40% in 1984, after the adoption of the amended consent decree.

[17] See pp. 3-4 and n.3 below.

[18] The United States Civil Rights Commission has reported that "stereotyped misconceptions by supervisors regarding minority group capabilities" has in itself led to "widespread perpetuation of past discriminatory practices." H.R. Rep. No. 238, 92d Cong., 1st Sess. 17. In addition, the isolation of the minority worker is "exacerbated" by the absence of minority supervisors. Spiegelman, *Court Ordered Hiring Quotas After Stotts: A Narrative on the Role of the Moralities of the Web and the Ladder In Employment Discrimination Doctrine*, 20 Harv. Civil Rights-Civil Lib. L. Rev. 339, 371 (1985). *See also id.* at 371-76.

The district court agreed with the plaintiff that the absence of minority supervisors was interfering with an effective remedy for hiring and assignment discrimination. (J.A. 68) *See also* J.A. 50 (testimony of the Director of Public Safety).

[19] The goals established for future examinations were designed in part to mitigate any adverse impact from such examinations. Plaintiff had no way to insure that the future examinations would be developed properly. Without the further assurance that the adverse impact of such examinations would be minimized, plaintiff's only recourse would have been more protracted litigation over the validity of future examinations, further delaying elimination of the vestiges of discrimination.

The results from the 1984 and 1985 examinations confirm the reasonableness of this approach. Both of these examinations are of doubtful validity and produced a severe adverse impact on minorities. Plaintiff decided not to engage in further litigation over these examinations because the use of goals reduced, but did not eliminate, the adverse impact. Without the goals, plaintiff

needs of the citizens of Cleveland for a representative public safety force."[27] See Part II.C.3. below.

C. The Consent Decree Is Carefully Tailored Towards Meeting Its Objectives.

The consent decree likewise satisfies the remaining criteria which the Court has identified for the evaluation of race-conscious affirmative action plans. These criteria focus upon the degree to which the means chosen is tailored to achieving the decree's objectives. First, the scope of the remedy chosen is modest in comparison to the scope of the violations admitted by the city and found by the trial court. While the minority population of the City of Cleveland is over 47%, the decree establishes much lower goals staggered throughout the relatively short life of the decree which do not exceed 25% for the rank of lieutenant and 20% for the upper ranks.

Second, the plan meets the dual criteria of temporariness and flexibility. The decree will last for the "relatively short" period of four to five years. (City App. A5) This is in sharp contrast to the nine year plan originally contemplated by the parties. Flexibility is insured by a provision relieving the city of its obligation to meet the goals if an insufficient number of minorities pass the examinations and by affording the city complete control

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almost certainly would have found it necessary to challenge the validity of the 1984 and 1985 examinations.

[27] The remedy was also geared towards ameliorating the effects of past discrimination on its indirect victims, the members of the public. When it extended Title VII to state and local governments in 1972, Congress found that the unrepresentativeness of local bureaucracies "not only promotes ignorance of minority problems in the particular community, but also creates mistrust, alienation, and all too often hostility towards the entire process of government." S. Rep. No. 415 at 10. *See also* H.R. Rep. No. 238 at 17. As confirmed by Cleveland's Director of Public Safety, the need for minority supervisors in local government is crucial. (J.A. 51) *See also* Brief for City of Detroit et al. as Amici Curiae at Part I; Brief for the National Conference of Black Mayors, Inc. as Amicus Curiae at pp. 10-16.

over the number of promotions to be made following the initial group of appointments.[28]

Finally, because the decree created vacancies in excess of the number of minority promotions, the remedy has little if any impact on the interests and legitimate expectations of non-minority firefighters. Fully 79% of all promotions which have occurred since the approval of the consent decree have been awarded to non-minorities. Non-minorities have fared better under affirmative action than they would have fared without it. Moreover at the insistence of Local 93, the affirmative action plan restored the use of prior service credits, thereby preserving for non-minorities an advantage of questionable legality.[29]

In addition, other factors support the district court's findings that the plan is fair and reasonable. The plan was adopted only after consideration of a variety of alternative remedies including a more vigorous remedy proposed by the Vanguards and the city and an ineffective "remedy" initially proposed by Local 93. (J.A. 109) The final remedy was a product of three-way discussions and closely resembled a second proposal tendered by Local 93.[30] The plan exhibits a high probability of benefiting those persons who were actually victimized by prior discrimination at the hands of the city. See Part III.B. Lastly, the

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[28] See also the reservation of jurisdiction in the Court "for all purposes of enforcement, modification or amendment of [the] decree upon the application of any party, including intervenor . . . ." (Pet. App. A38)

[29] *See Shield Club v. City of Cleveland*, note 1 above.

[30] The "remedy" now advocated by the Department of Justice was rejected as ineffectious. Had the plaintiff and the defendant opted for the approach urged by the Department of Justice, the city would have undoubtedly been permitted to promote forty persons on the basis of the 1981 examination, only three of whom would have been minority. Litigation would have been required on the validity of the 1981, the 1984 and the 1985 examinations and lengthy and expensive hearings would have been required to verify the victim status of the members of plaintiff's class.

plan is equitable. The plan was adopted only after full participation by Local 93 and after generous concessions were made to accommodate the interests of its members.[28] The burden of the plan falls on the guilty party—the city—rather than on third parties. Instead of trammeling the interests of third parties, the decree enabled non-minorities to obtain more promotions.

D. For Purposes Of Affirmative Remedies, A Consent Decree Is Equivalent To Other Voluntary Affirmative Action Plans.

In *Weber*, the Court recognized that Title VII authorizes and encourages voluntary, non-victim-specific affirmative action measures. The Court relied on the strong policy of encouraging " 'employers and unions to self-examine and self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this nation's history.' " 443 U.S. at 204 (quoting *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975)). These same policies lead to the conclusion that for purposes of determining the lawfulness of race-conscious remedies, consent decrees should be viewed as the substantial equivalent of voluntary affirmative action plans.[29]

Congress intended that Title VII be construed so as to strongly favor voluntary settlement. "Voluntary compliance with Title VII . . . is an important public policy. Congress intended cooperation and conciliation to be the preferred means of enforcing Title VII." *Alexander v. Gardner Denver Co.*, 415 U.S. 36, 44 (1974). *See also, W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 770-71 (1983). Consent decrees like conciliation agreements

[28] The balancing process engaged in by the plaintiffs, the defendants and Local 93 and by the district court is entitled to a degree of deference by a reviewing court. *See Fullilove*, 448 U.S. at 508 (Powell, J.).

[29] See Brief for National League of Cities, et al. as Amici Curiae at Part B.1. and Brief for City of Atlanta, et al. as Amici Curiae at Part II.

enhance this Congressional policy and serve the public interest. *Carson v. American Brands*, 450 U.S. 79, 88 n.14 (1981). Such settlements serve the interest of the courts in conserving judicial resources, the interest of plaintiffs in a prompt remedy and the interests of defendants in avoiding protracted litigation and maintaining harmonious relations with the workforce.

Like the employer's adoption of the plan in *Weber*, entry into a consent decree is a voluntary action on the part of an employer. Just as employers engage in self-evaluation and voluntary self-correction prior to being faced with a lawsuit, this process also occurs and is encouraged after the filing of a compiaint. In this case the City of Cleveland engaged in precisely this kind of self-evaluation and self-correction. The district court did not cajole the city to come to the bargaining table. The filing of the complaint focused the attention of the city on the magnitude of its misdeeds and the city promptly opened negotiations with the plaintiff over the content of a voluntary affirmative action plan.

The differences between consent decrees and other voluntary plans do not justify evaluating voluntary affirmative measures as court-imposed remedies merely because they are included in a Title VII settlement. The fact that the decree is entered as an order and that the court retains jurisdiction does not make the employer's participation in the agreement involuntary or coerced. *Stotts*, 467 U.S. at ——, 104 S. Ct. at 2586, makes it clear that the role of the court is limited to enforcing the parties' voluntary agreement. The fact that a consent decree is enforceable also does not differentiate it from the voluntary action at issue in *Weber*. The collectively-bargained plan in *Weber* is enforceable in court pursuant to the Labor-Management Relations Act, 29 U.S.C. § 185 (1976). *See Vaca v. Sipes*, 386 U.S. 171 (1967).

The Department of Justice concedes that Title VII settlements that use affirmative measures may be effectuated out-of-court. Br. at 30. Such settlement agreements

would be enforceable as contracts and, if challenged by a non-minority worker, would be reviewable under *Weber*. *Id.* If the Court were to hold that voluntary affirmative action may not be incorporated into a consent decree, it is likely that many Title VII litigants would opt for such out-of-court settlements. Yet, there is no reason or policy for forcing parties to utilize such out-of-court settlements, thereby depriving the public of judicial oversight of Title VII settlements, depriving the parties of a superior form of settlement and depriving defendants of the preclusive effect on absent class members.

The fact that a consent decree might later be used as a defense against claims of non-minority workers does not mean that such decrees should be viewed as court-imposed orders and not as voluntary affirmative action. Incorporation of a legal, voluntary affirmative action plan into a consent decree does not change the effect of such a plan on non-minority workers. In the absence of the decree, non-minority challenges to the plan would be governed by the principles established in the *Weber* case (and, in the case of public employers, the *Bakke* case). Thus, so long as the Court determines that the affirmative measures are consistent with *Weber* (and *Bakke*), incorporation of the measures into a court-approved decree will not prejudice non-minority workers.[30]

[30] In some cases—in contrast to the circumstances of this case (see Part IV below)—a consent decree will purport to override the legal rights of non-minorities under a collective bargaining agreement or other contract. This Court has never explicitly ruled on the standards applicable to court approval of consent decrees that override contractual rights. In *W.R. Grace & Co.*, 461 U.S. at 771, the Court ruled that "absent a judicial determination", an EEOC conciliation agreement could not operate to relieve an employer of its obligations under a collective bargaining agreement "without the union's consent." The Court did not indicate what type of "judicial finding" is necessary in order to override the employer's contractual obligations. Since no collective bargaining agreement is affected by the consent decree in this case (Part V below) it should be unnecessary to reach this question. However, if the Court should deem it appropriate to address this issue, plaintiff suggests

II. THE CONSENT DECREE IS AUTHORIZED UNDER TITLE VII.

If the Court agrees that the consent decree is properly viewed as the equivalent of a voluntary affirmative action plan, it should affirm. The court of appeals held that the consent decree satisfies the requirements of voluntary affirmative action and Local 93 does not challenge this portion of the court of appeals' opinion. (Pet. App. A9-12) Should it be necessary to reach the question of whether like relief could be ordered by a district court, the remedy is fully authorized as if it were imposed following a trial on the merits.

A. Title VII's Legislative History Indicates That Affirmative Remedies Are Authorized.

Congress initially enacted Title VII in 1964, 78 Stat. 253, and extended and strengthened the statute in 1972, Equal Employment Opportunity Act of 1972, 86 Stat. 103. It is crucial to look at the legislative history of both the 1964 and 1972 Acts in order to ascertain Congress' intent with respect to the types of remedies that are authorized. In fact, prior to the 1972 amendments, Title VII did not cover state and local governments. Thus, the 1972 legislative history is particularly illuminating with respect to the types of remedies Congress contemplated in cases involving state and local governments.

1. *The 1964 Legislative History Shows No Intent To Prohibit Affirmative Remedies.*

As noted in the Justice Department's brief in *Weber*,[31] the 1964 legislative history provides no clear indication

that judicial findings that a violation of Title VII has occurred and that the remedy is tailored to the scope of the violation, should be sufficient. Such findings were made in the instant case and have not been contested by Local 93.

[31] Brief for Petitioners the United States and the Equal Employment Opportunity Commission, *Steelworkers v. Weber*, No. 78-432, at 28-31. The Department of Justice's brief in the *Weber* case totally refutes the arguments made by the current Solicitor General concerning Title VII's legislative history.

concerning Congress' view of race-conscious remedial measures. However, the 1964 Act did make clear that the federal courts were to have broad discretion to devise effective remedies.[32] Thus, the question is whether Congress intended to absolutely prohibit race-conscious affirmative remedies, regardless of the circumstances and regardless of what the federal courts were to determine concerning the need for such remedies. The 1964 history does not provide such an express, absolute prohibition. Rather, it is clear that Congress' concern in 1964 was in prohibiting inflexible quotas for the purpose of *maintaining* racial balance.

There is no doubt that Title VII prohibits courts from finding a violation of the Act solely because of racial imbalance in the workforce and from imposing racial quotas for the purpose of maintaining a permanent racial balance. Section 703(j) was added explicitly for this purpose. *Weber*, 443 U.S. at 206-07. However, as repeatedly recognized by the federal courts, there is a difference between such inflexible, prohibited quotas and temporary race-conscious goals to remedy the effects of prior discrimination. The many anti-quota statements in the 1964 legislative history simply do not address the question of race-conscious affirmative *remedies*.[33]

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[32] Section 706(g) was patterned after Section 10(C) of the National Labor Relations Act. At the time Title VII was enacted, remedial authority under that Act was not limited to making victims whole, but rather the Act was broadly construed to allow whatever remedies were necessary to protect the public interest in the policies underlying the Act. *See* Brief for NAACP Legal Defense Fund, et al. as Amici Curiae, Local 28, Sheet Metal Workers v. EEOC, No. 84-1656 at Part I.A.

[33] The opponents of Title VII had argued that the Act would require employers to maintain racially balanced workforces whether or not they had ever discriminated. *E.g.*, H.R. Rep. No. 914, 88th Cong., 1st Sess. 67-69 (1963) (minority report); 110 Cong. Rec. at 4764 (Sen. Ervin; Sen. Hill), 5092, 7418-20 (Sen. Robertson), 8500 (Sen. Smathers), 9034-35 (Sen. Stennis; Sen. Tower). The statements relied upon by Local 93 and its amici are responsive to this concern. However, none of these statements define what is meant by "quota" and the most reasonable interpretation is that the

Prior to *Weber*, employers and unions had routinely relied upon § 703(j) in opposing race-conscious remedies. However, *Weber* held that "section 703(j) speaks to substantive liability under Title VII" and is not concerned with whether race can be taken into account for remedial purposes. 443 U.S. at 205 n.5. After *Weber*, the opponents of race-conscious remedies, recently joined by the Department of Justice, searched for another section of Title VII on which to hinge their arguments. They seized on the last sentence of § 706(g), Title VII's remedial provision which had lain dormant in this controversy for twenty years.

However, the last sentence of § 706(g) sets out a factual predicate for its application: that "an individual . . . was refused employment or advancement or was suspended or discharged for any reason other than discrimination." Affirmative remedial goals do not require the hiring or promotion of *an individual*; rather they direct the employer to select from among qualified members of the class against whom the employer has discriminated. Thus, as the Court of Appeals for the Third Circuit has found, the last sentence of § 706(g) was designed to preserve the employer's defense against a claim for *individual* relief. *EEOC v. American Tel. & Tel. Co.*, 556 F.2d 167, 174-77 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978).

Although the 1964 legislative history relating to § 706 (g) is sparse, it supports this interpretation of the last sentence. Congressman Celler explained that this sentence was added to preclude the finding of "any *violation* of the act which is based on facts other . . . than discrimination." 110 Cong. Rec. 2567 (1964) (emphasis added). An interpretative memorandum introduced by Senators Clark

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speakers simply intended to restate § 703(j). The Court has already explicitly rejected the argument that Senator Humphrey's remarks were intended to prohibit affirmative remedies. *Weber*, 443 U.S. at 207 n.7.

and Case also suggests that the last sentence is concerned with claims of individual, as opposed to class-based prospective, relief.[34]

2. *The Federal Courts Concluded Between 1964 And 1972 That Affirmative Remedies Are Necessary To Achieve The Purposes Of Title VII.*

Between the enactment of Title VII in 1964 and the Act's amendment in March, 1972, the lower federal courts elaborated upon the distinction between prohibited "quotas" and necessary affirmative remedies. These courts reached a consensus that non-victim-specific affirmative measures are necessary in some circumstances to achieve Title VII's remedial purposes. For example, in 1969 the Fifth Circuit upheld an injunction ordering an all-white union to alternate between whites and blacks in making referrals. *Int'l Ass'n, Heat & Frost Insulators v. Vogler*, 407 F. 2d 1047, 1055 (5th Cir. 1969).

The Fifth Circuit's decision in *Vogler* was quickly followed by other federal courts. In *United States v. Ironworkers Local 86*, 443 F.2d 544, 553 (9th Cir. 1977), *cert. denied*, 404 U.S. 984 (1971), the Ninth Circuit upheld a 30 percent goal for apprenticeship classes, concluding that race-conscious relief for the purpose of preventing future discrimination did not constitute a prohibited "quota." By the time Title VII was amended in 1972, five federal circuits and numerous federal district courts had concluded that affirmative numerical remedies are authorized

[34] As § 706(g) (then § 707(e)) left the House Judiciary Committee it read as follows: "No order of the court may require . . . the hiring, reinstatement or promotion of an individual . . . if the individual . . . was refused employment or advancement . . . *for cause*." H.R. 7152, reported in H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963) *reprinted in* 1964 U.S. Code Cong. & Ad. News 2391, 2405 (emphasis added). The interpretative memorandum states that the last sentence of this provision "makes clear what is implicit throughout the whole title: that employers may hire and fire, promote and refuse to promote for any reason, good or bad, provided only that individuals may not be discriminated against because of race, color, religion, sex or national origin." 110 Cong. Rec. at 7214.

under Title VII.[35] No federal court had ruled that race-conscious numerical remedies are absolutely prohibited by Title VII. Also during the period from 1964 to 1972, the attorney general concluded and the federal courts held that use of numerical goals in enforcing Executive Order 11246 does not violate Title VII or the Constitution. *Southern Ill. Builders Ass'n v. Ogilvie*, 471 F. 2d 680, 684-86 (7th Cir. 1972); *Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159, 171-73, 176-77 (3d Cir. 1971), *cert. denied*, 404 U.S. 864 (1971).

3. *Congress Explicitly Approved Non-Victim-Specific Remedies In 1972 When It Comprehensively Revised And Expanded The Coverage Of Title VII.*

The 1972 legislative history confirms that Congress understood and ratified the distinction between prohibited "quotas" and permissible race-conscious remedies. The Court has repeatedly held that subsequent legislative history is most authoritative when Congress rules on its understanding of the meaning of a statute in revising that statute.[36]

[35] *Vogler, aff'g*, 294 F. Supp. 368 (E.D. La. 1968); *United States v. Elec. Wkrs. Local No. 38*, 428 F.2d 144, 149-50 (6th Cir. 1970), *cert. denied*, 400 U.S. 943 (1970); *United States v. Carpenters Local 169*, 457 F. 2d 210 (7th Cir. 1972); *Carter v. Gallagher*, 452 F. 2d 315 (8th Cir. 1971) (en banc), *aff'g in part*, 3 FEP Cas. 602 (D. Minn. 1971); *Ironworkers Local No. 86, aff'g*, 315 F. Supp. 1202 (W.D. Wash. 1970); *NAACP v. Allen*, 340 F. Supp. 703, 707-06 (M.D. Ala. 1972), *aff'd*, 493 F. 2d 614 (5th Cir. 1974); *United States v. Local 638*, 337 F. Supp. 217, 220 (S.D.N.Y. 1971); *Buckner v. Goodyear Tire & Rubber Co.*, 339 F. Supp. 1108, 1125 (N.D. Ala. 1972), *aff'd without opinion*, 476 F. 2d 1287 (5th Cir. 1973); *United States v. Central Motor Lines, Inc.*, 4 FEP Cas. 216, 229-41 (W.D. N.C. 1971); *Thorn v. Richardson*, 4 FEP Cas. 299, 303 (W.D. Wash. 1971). The Justice Department was the plaintiff that sought the race-conscious relief in over half of these cases.

[36] *E.g., Bell v. New Jersey*, 461 U.S. 773, 784-85 & n.12 (1983); *Bob Jones University v. United States*, 461 U.S. 574, 599-602 (1983); *Andrus v. Shell Oil Co.*, 446 U.S. 657, 671-72 (1980); *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 595-96 (1980); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1969).

The issue of race-conscious affirmative remedies was explicitly addressed by both the House and the Senate. The House Report states: "Affirmative action is relevant not only to the enforcement of Executive Order 11246 but is equally essential for more effective enforcement of Title VII in remedying employment discrimination." H.R. Rep. No. 238, 92d Cong., 1st Sess. 16 (1971).[27] Moreover, both the House and Senate reports cited with approval several of the court decisions upholding race-conscious non-victim-specific affirmative remedies. *See, e.g.*, S. Rep. No. 415, 92d Cong., 1st Sess. 5 n.1, 21 (1971); *id.* at 21 (citing *Vogler* with approval and noting that "affirmative . . . preliminary relief is required"); H.R. Rep. No. 228 at 13 and n.4 (1971) (citing two cases imposing affirmative remedies as having "contributed significantly to the . . . effort to combat employment discrimination"). Additionally, the section-by-section analysis of the final version of the bill submitted with the conference report to both the Senate and the House states in the second paragraph:

> In any area where the new law does not address itself, or in any area where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.

1972 Leg. Hist. at 1844, 1856.[28]

In the Senate, Senator Javits, the co-floor leader of the bill, inserted copies of the Third Circuit's decision in the *Contractors Association* case and the Ninth Circuit's decision in the *Ironworkers Local 86* case into the Congressional Record.[29] *1972 Leg. Hist.* at 1048-70. He de-

[27] The reference to Executive Order 11246 here makes clear that the report used the words "affirmative action" to include race-conscious numerical goals and timetables.

[28] References to *1972 Leg. Hist.* are to *Subcommittee on Labor of the Senate Committee on Labor and Public Welfare: Legislative History of the Equal Employment Opportunity Act of 1972*, 92d Cong., 2d Sess.

[29] *See* pp. 26-27 above.

fended these decisions and argued that an amendment sponsored by Senator Ervin "would deprive the courts of the opportunity to order affirmative action under Title VII of the type which they have sustained." *Id.* at 1048. Senator Javits also inserted into the record a description of two race-conscious consent decrees that had recently been negotiated by the Department of Justice. *Id.* at 1071-72. He argued that the Ervin amendment "would make it impossible for the Justice Department to obtain such decrees in the future." *Id.* at 1071. Immediately following this discussion, the Ervin amendment was rejected by a two-to-one margin."[30] *Id.* at 1074-75.

Local 93 and its amici rely on the general agreement in the House of Representatives that "quotas" are prohibited by Section 703(j), in arguing that affirmative remedies are prohibited by § 706(g). In fact, the 1972 debate in the House of Representatives focused specifically on the difference between prohibited "quotas" and permissible affirmative remedies and the House took action that indicates that affirmative remedies are authorized. Representative Dent introduced an amendment to the committee bill that would have prohibited the EEOC "from imposing or requiring a quota or preferential treatment." *Id.* at 189. Representative Dent stated that such a prohibition already applied under Title VII and that the amendment would extend it to the Executive Or-

[30] Contrary to the assertion of the Department of Justice, Br. at 13 & n.10, Senator Ervin's amendment was not limited to the Executive Order program. Senator Ervin erroneously believed that § 703(j) prohibited all uses of remedial goals. *1972 Leg. Hist.* at 1042-43. However, Senator Ervin noted that, contrary to his understanding of the statute, both the OFCC and the EEOC had sought and obtained such goals. *Id.* at 1042-45. Thus, he introduced an amendment which reflected his understanding of the statute and would have prohibited both OFCC and the EEOC from seeking and the courts from imposing, such remedies. The Senate's rejection of the Ervin amendment thus constitutes an express rejection of Senator Ervin's understanding of Title VII and ratification of the uniform interpretation of the federal courts, the EEOC, the Department of Justice and the Department of Labor.

der program. *Id.* at 190. Representative Hawkins, the Chair of the Education and Labor Committee and the sponsor of the committee bill, disagreed that the use of numerical goals under the Executive Order program constituted a prohibited "quota" within the meaning of Title VII.[41] Representative Hawkins did not oppose the Dent amendment because he viewed it as mere surplusage. *1972 Leg. Hist.* at 209, 212-13.

Other members of the House were less sanguine than Representative Hawkins about the purpose and effect of the Dent amendment. Although these members agreed that affirmative numerical goals did not violate Title VII,[42] they were "appalled" at the Dent amendment and were afraid that it would be interpreted to "subver[t] the Philadelphia plan and the Office of Federal Contract Compliance's effort to carry forward an affirmative action program." *1972 Leg. Hist.* 222 (Rep. Steiger). They urged the House to vote for the Erlenborn substitute instead of the committee bill, because the substitute would not alter the use of numerical goals. *Id.* Representative Erlenborn assured the House that an affirmative action plan with "effective goals," *id.* at 283, "does not violate Title VII." *Id.* at 284.

The committee bill was rejected and the Erlenborn substitute was passed by the House. *Id.* at 312-14. Passage of the substitute upon the assurance of its proponent and supporters that not even the broad use of affirmative action under the Executive Order program violated Title VII makes clear that the narrower remedial use of affirmative remedies under Title VII was not thought by the House to constitute a prohibited "quota".[43]

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[41] Representative Hawkins explicitly stated: "I disagree that the Philadelphia plan imposes a quota." *1972 Leg. Hist.* 212. *See also id.* at 204, 209.

[42] *E.g., 1972 Leg. Hist.* at 209, 283-84 (Rep. Erlenborn); *id.* at 259, 261 (Rep. Ford) ("Philadelphia Plan . . . does not have anything to do with quotas").

[43] Congress in 1972 recognized that the use of numerical remedies under the Executive Order was broader than the use of such

The 1972 anti-quota statements relied upon by Local 93 and its amici refer to the inflexible maintenance of fixed minority percentages, rather than temporary affirmative remedies. One of the statements is by Representative Hawkins, who, as noted above, did not believe that the use of goals and timetables in the Philadelphia plan constituted a "quota". None of these general anti-quota statements mentions § 706(g) or even implies that the prohibition extends to affirmative race-conscious goals for the purpose of remedying identified discrimination.[44]

Congress also expressed its approval of affirmative remedies in making several changes to Title VII itself in 1972. Congress added a provision requiring each federal agency to develop "an affirmative program of equal employment opportunity."[45] Congress hardly could have

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remedies by courts enforcing Title VII. For example, Senator Saxbe remarked: "The Executive order program should not be confused with the judicial remedies for proven discrimination, which unfold on a limited and expensive case-by-case basis. Rather, . . . [p]roof of overt discrimination is not required." *1972 Leg. Hist.* 915. *See also id.* at 921 (Senator Williams), at 648-49 (Senator Javits).

[44] Even those members of Congress such as Representative Dent who believed that the Executive Order program violated Title VII, did not necessarily believe that affirmative remedies for proven discrimination were similarly prohibited. As discussed in note 43 above, the Executive Order program's use of numerical goals was much broader than that of the courts remedying Title VII violations. Moreover, the primary complaint about the Executive Order program was that unreasonable goals were demanded. *See e.g., 1972 Leg. Hist.* at 287. Clearly, belief that unreasonable enforcement of the Executive Order program constitutes an impermissible quota does not necessarily imply a similar belief with respect to properly tailored, reasonable affirmative race-conscious remedies.

[45] Section 717(b)(1), P.L. 92-261 § 11, 86 Stat. 111, *codified at* 42 U.S.C. § 2000e-16(b). The Senate Report provides that the Civil Service Commission is to review such plans "with full consideration of particular problems and employment opportunity needs of individual minority group populations within each geographic area." S. Rep. No. 415 at 15. The proponents of § 717 argued that "the Federal Government must be a model of equal employment opportunity," and concluded: "[t]his requires that federal

intended to require the federal government to engage in affirmative action as a "model employer," and yet to prohibit such measures in Title VII remedial decrees."

B. This Court Has Recognized That Title VII Authorizes Affirmative Remedies And Has Recognized A Distinction Between Make-Whole Relief For Victims And Affirmative Action To Achieve Title VII's Other Remedial Goals.

This Court has concluded that voluntary non-victim-specific affirmative action plans are "effective steps to accomplish the goal that Congress designed Title VII to achieve," and that they "hasten the elimination of [the vestiges of past discrimination]." *Weber*, 443 U.S. at 204-05. Moreover, five members of the Court indicated their approval of Title VII affirmative remedies in their opinions in the *Bakke* case. *Bakke*, 438 U.S. at 353 n.28 (Brennan, White, Marshall & Blackmun, JJ.); *id.* at 301-02 (Powell, J.).[47] All five of these Justices cited with approval cases which upheld non-victim-specific numerical goals under Title VII. *Id.* Justice Powell also approved the use of non-victim-specific affirmative goals in Title VII consent decrees. *Id.* at 302 n.41. Moreover, the Court has repeatedly recognized that make-whole relief for proven victims is only "one of the central purposes of Title VII." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763 (emphasis added). In addition, a Title VII remedial decree must "eliminate the discriminatory effects

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agencies make a special effort to employ and promote qualified minority persons *according to their relative proportions in the populations of the area surrounding agency field offices.*" *1972 Leg. Hist.* at 1745 (Senator Cranston) (emphasis added). *See also id.* at 289 (Rep. Badillo).

[46] Congress' approval of affirmative remedies is additionally reflected in its extension of Title VII's coverage to state and local governments. See Brief for City of Atlanta, et al. as Amici Curiae at Part I.

[47] See the numerical remedial orders in the cases cited by Justice Powell, including *Bridgeport Guardians, Inc. v. Bridgeport Civil Service Comm'n*, 482 F. 2d 1333, 1339 (2d Cir. 1973) (a hiring goal of one for one or more); *Carter*, 452 F. 2d at 331 (one for two hiring goal).

of the past as well as bar like discrimination in the future." *Albemarle Paper Co.*, 422 U.S. at 418 (quoting *Louisiana v. United States*, 380 U.S. at 154).

Local 93 and its amici ignore the well-established distinction between retrospective make-whole relief and prospective race-conscious remedies. As noted in *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977), "a court's finding of a pattern or practice justifies an "award of prospective relief," *id.* at 361, "to assure that employers . . . eliminate their discriminatory practices and the effects therefrom." *Id.* n.47. In contrast, "[w]hen the Government seeks individual relief for the victims of the discriminatory practice, a district court must usually conduct additional proceedings . . . to determine the scope of individual relief." *Id.* at 361.[48]

C. Limiting Relief To Proven Victims Would Thwart Congress' Goal Of Providing A Complete Remedy For The Effects Of Discrimination.

Local 93 and the Department of Justice ask this Court to accept their unsupported assertions that make-whole relief for identified, direct victims, coupled with general injunctions against future discrimination and mild affirmative recruiting efforts, will in all circumstances be sufficient to eradicate the devastating effects of long-

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[48] *Teamsters* leaves no doubt that prospective relief includes numerical goals. The Court recited that the partial consent decree included a temporary fifty-percent minority hiring goal (431 U.S. at 330 n.4) and then specifically noted with approval: "In this case prospective relief was incorporated in the parties' consent decree. See n.4 *supra*." *Id.* at 361, n.47.

The decision in *Stotts* concerned only the remedy of retroactive seniority in a layoff situation. Because (703(h) protects bona fide seniority systems, the Court concluded that retroactive seniority is available only for purposes of make-whole relief for proven victims. 467 U.S. at ——, *id.* at 2588. *Stotts* did not suggest that the decision was intended to overrule the long line of Supreme Court and lower court precedents upholding race-conscious prospective relief that does not involve a seniority system. Indeed, the underlying decree in *Stotts* imposed non-victim-specific numerical hiring and promotion goals, *id.* at 2581, and the Court nowhere intimated that this aspect of the remedy was unlawful.

1. *Eliminating The Effects Of Discrimination In The Workforce.*

In many situations, non-victim-specific race-conscious relief is the only effective vehicle for achieving a workforce which bears any reasonable resemblance to the workforce which would have existed but for the employer's long-standing discriminatory practices. Where discrimination has created an all-white (or virtually all-white) workforce or supervisory force, the significant practical limitations of make-whole remedies often mean that affirmative action is the only way to eliminate this vestige within a reasonable time period. If unlawful discrimination were always detected and remedied immediately, then merely placing identified, proven victims into their rightful place would produce a workforce whose racial composition was not affected by discrimination. Yet direct victims cannot always be identified, and even when they are, the passage of time often has caused such changes in the victims' lives that it is not possible to reconstruct the past. *See Franks*, 424 U.S. at 776 n.36. And where the employer does not maintain records of applications, or where the employer's reputation has deterred minority applicants, it is unlikely that most victims will be identified.[55]

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[55] Speedy elimination of the vestiges of an unrepresentative workforce is not merely a theoretical concern. Serious and ongoing harms are caused by this condition. Oftentimes, the employer has gained such a reputation for discrimination that qualified minorities are deterred from applying unless a remedial decree provides some possible assurance that, if qualified, they will in fact be hired. *E.g., Teamsters*, 431 U.S. at 365-66. Minority workers who are fortunate enough to be hired into a previously segregated workforce suffer from the well-recognized and painful consequences of victim group isolation in their place of employment. *See* Spiegelman, n.22 *supra* at 371-76. The absence of minority supervisors sends the minority worker an unambiguous message about his advancement opportunities at his place of employment and creates additional pressures on minority workers. In addition, without minority supervisors, recruitment of minorities into all ranks frequently suffers. *E.g., United States v. N. L. Industries, Inc.*, 479 F.2d 354, 368-69, 377 (8th Cir. 1973).

standing discrimination. As discussed below, plaintiff disagrees with these assertions. However, the Vanguards are not merely asking the Court to accept its allegations on this point. Rather, we ask the Court to rely on the experience of those who have struggled to enforce Title VII for more than twenty years: the federal courts; the Department of Justice during the administrations of two Republican and three Democratic Presidents;[49] each Secretary of Labor since at least 1969; the Equal Employment Opportunity Commission;[50] and numerous state and local human rights commissions.[51]

The "hands on" experience of the federal courts over more than two decades of attempting to provide meaningful discrimination remedies has convinced these courts that non-victim-specific race-conscious measures are sometimes necessary to prevent future discrimination and to eradicate the lingering effects of past discrimination. All of the courts of appeals have repeatedly and consistently upheld non-victim-specific affirmative remedies under Title VII.[52]

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[49] Approximately one-half of the cases in which affirmative remedies were sought and obtained were brought by the Department of Justice and the Equal Employment Opportunity Commission. *See* Brief for City of Detroit, et al. as Amici Curiae at Part I.

[50] Even during the present Administration, the EEOC has consistently taken the position that affirmative remedies are authorized under Title VII. For example, in 1984, EEOC Chairman Clarence Thomas sent a legal memorandum to Congressman Barney Franks which stated: "the Supreme Court's decision in *Stotts* does not require the Commission to reconsider its established position that Title VII permits the use of prospective, race-conscious remedies where appropriate to remedy the effects of past discrimination." Memorandum to the Commission from Office of General Counsel, June 28, 1984, at 7, enclosed with Letter to Congressman Barney Franks from Chairman Clarence Thomas, August 30, 1984.

[51] *See* Brief of the State of California, *et al.* as Amici Curiae.

[52] *See e.g.*, cases cited in *Stotts*, 467 U.S. at —— n.10, 104 S. Ct. at 2586 n.10 (Blackmun, J., dissenting).

2. *Preventing Future Discrimination.*

One of the most compelling reasons for utilizing numerical goals is to prevent future discrimination. Employers and unions that have violated Title VII do not always reform their behavior when confronted with an injunction which simply "parrots" the commands of Title VII.[54] Utilizing a numerical measure of non-discriminatory conduct in this situation is analogous to using statistical evidence to determine whether the employer discriminated in the first place. Such measures merely calculate the number of minority employees that the employer would be expected to hire absent discrimination and then shift to the employer the burden of demonstrating a good faith effort to meet the goal.[55]

3. *Preventing Harm To Third-Party "Victims".*

The victims of discrimination are not limited to those "identified" individuals who are directly denied jobs and/or promotions. Entire communities suffer when the effects of past discrimination produce all-white state and local bureaucracies. Numerous courts have found that mistrust of all-white police departments by minority communities reduces citizen cooperation in criminal investigations with serious public safety consequences.[56] Because a major responsibility of fire departments is to investigate fire hazards and possible arson, similar mistrust of these safety departments creates the same risk to the public. The importance of representative state and local bureaucracies was emphasized by Congress when it extended Title VII's coverage to these jurisdictions in 1972. *See* S. Rep. No. 415, at 10 (quoted at p. 18 n.24 above); H.R. Rep. No. 238, at 17.

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[54] *See* Brief for the NAACP Legal Defense Fund, *et al.* as Amici Curiae at Part I.A.(2); Brief for the City of Birmingham, Alabama as Amicus Curiae at Part II.A.

[55] Numerical goals are also typically used to prevent future discrimination in cases where the employer has used a selection procedure that produces an adverse impact on minority candidates. *See* Brief for the NAACP Legal Defense Fund, et al. as Amici Curiae at Part I.A.(3).

[56] *See e.g., Bratton*, 704 F. 2d at 896.

4. *Approximating Partial Make-Whole Relief And Facilitating Settlements.*

In many cases, particularly those that are settled, race-conscious remedies may serve as a reasonable approximation of partial make-whole relief for actual victims.[57] The number of actual victims in a Title VII lawsuit generally can be established with reasonable certainty using statistical evidence. The attempt to identify each of those actual victims frequently is much more difficult and costly. Thus, the parties may choose to avoid this expensive and protracted process by agreeing on race-conscious affirmative measures that benefit the group of individuals who are potential proven victims.[58]

III. THIS CONSENT DECREE IS CONSISTENT WITH THE OBJECTIVES OF TITLE VII.

A. This Consent Decree Includes Relief Which Advances The Goals Of Title VII.

Local 93 and its amici argue that the remedy included in a consent decree cannot be broader than the remedy authorized by Title VII in litigated cases. As discussed in Part II.A. above, affirmative remedies are authorized under Title VII and therefore it should be unnecessary to

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[57] Such relief is partial because beneficiaries of race-conscious affirmative action typically do not receive backpay, retroactive seniority or other make-whole relief.

[58] Such a remedy has several advantages in addition to speed and cost-effectiveness. It maximizes the employer's freedom by allowing it to choose which of the members of the victim group will be benefited. By applying the employer's own selection procedures to the "possible" victims, subject to a race-conscious goal, the effects of any lingering bias are neutralized and the resulting selections should closely approximate the selections that would have been made by the employer in the absence of discrimination.

Moreover, as long as the affirmative plan is reasonably related to the number of actual victims indicated by the statistical evidence, non-minority workers will be in no worse position than if all of the actual victims were found and "slotted into" their rightful places. Indeed, non-minority incumbents often will be better off under an affirmative action remedy since such remedies generally do not disrupt the existing seniority roster.

reach Petitioner's argument. In addition, Petitioner ignores the fact that the consent decree is also grounded in 42 U.S.C. § 1981 and the Fourteenth Amendment and is fully authorized by those provisions. (See Part VI below).

Consent decrees need not be restricted to relief which mirrors that which can be imposed by a district court following trial on the merits. Regardless of the meaning of § 706(g) of Title VII in litigated cases, that provision has no impact on consent decrees. The language relied upon by Local 93 begins "no order of the court shall require." A consensual remedy is not one which is required by the court, but rather is agreed to by the parties and submitted to the court for approval. Clearly § 706(g) protects employers from certain court orders, but does not create rights for any third parties.

A consent decree may afford the parties more or different relief than could have been ordered had the case gone to trial on the merits. The Court long ago recognized in *Pacific Railroad v. Ketchum*, 101 U.S. 289, 297 (1880) that: "Parties to a suit have the right to agree to anything they please in reference to the subject matter of their litigation, and the court, when applied to, will ordinarily give effect to their agreement, if it comes within the general scope of the case made by the pleadings." This principle was reiterated by Justice Brandeis writing for a unanimous court in *Swift & Co. v. United States*, 276 U.S. 311, 330 (1928). In upholding an anti-trust consent decree, the Court refused to entertain defendants' objections that the remedy was "not merely unauthorized by, but is contrary to, the common law and the Anti-Trust Act." Finally in *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236-37 (1975), the Court reaffirmed that "since consent decrees and orders have many of the attributes of ordinary contracts, they should be construed basically as contracts without reference to the legislation that [plaintiff] originally sought to enforce."

Local 93 and its amici apparently believe that *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961), overruled *sub silentio* this long line of precedents. However, Petitioner's expansive view of *System Federation* is not justified by a careful examination of that decision. In *System Federation* the district court refused to modify a consent decree entered under the Railway Labor Act, notwithstanding a complete reversal by Congress of the governing law between the time the decree was entered and the time modification was sought.[39] The language of the decree tracked the requirements of the earlier version of the statute.[40] The Court viewed its task in *System Federation* as an inquiry into whether, in view of Congress' reversal of recognized public policy, the consent decree would become an "instrument of wrong" were it to continue to be enforced.

The significance of *System Federation* is in its discussion about the degree to which a consent decree must comport with the unambiguous objectives of the statute under which the action was brought. The Court's language teaches that when a consent decree fundamentally conflicts with statutory objectives, a district court is free, in its sound discretion, to decline to approve the decree.[41] It is only when the district court approves or refuses to modify a decree in the face of a conflict between the decree and clearly discernible, uniform statutory objectives,

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[39] At the time the decree was entered, the Railway Labor Act prohibited closed shops under which employees were required to join the union as a condition of employment. In 1951, Congress amended the statute to permit closed shops. *See* Brief for National Leagues of Cities *et al.* as Amici Curiae at Part B.3.

[40] It was in this context that the Court in *System Federation No. 91* said: "*In a case like this* the District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce." (emphasis added) 364 U.S. at 651.

[41] "[J]ust as the adopting court is free to reject agreed-upon terms as not in furtherance of statutory objectives, so must it be free to modify the terms of a consent decree when a change in law brings those terms in conflict with statutory objectives." *System Federation*, 364 U.S. at 651.

that the district court's exercise of discretion will be overturned.[42]

In the instant case the district court did not abuse its discretion in concluding that the decree advances, rather than retards, the statutory objectives of Title VII. Assuming *arguendo* that Petitioner is correct in its interpretation of § 706(g), we are left with a situation under Title VII where a remedy may not be imposed by a court, but is recognized as effective and consistent with the purposes of Title VII when undertaken voluntarily. In such a situation, it cannot be said that inclusion of voluntary affirmative remedies in a consent decree—which falls in between other voluntary action and court-imposed mandates—clearly violates any well-established statutory policy.[43]

B. The Consent Decree Represents A Reasonable Settlement Of The Identity Of Actual Victims.

Contrary to the assertions of the Department of Justice, every single minority firefighter who benefits from the decree is a likely, actual victim of the Department's unlawful practices. Thus the settlement represents a reasonable compromise on a method of identifying actual vic-

[42] The Department of Justice compares this case to a consent decree adopted under the Norris-LaGuardia Act, 2 U.S.C. 104. In that Act, Congress expressly limited the jurisdiction of the federal courts to issue injunctive relief in labor disputes. No such jurisdictional limitation is at issue here.

[43] Congress' primary concern in enacting Title VII was "with the plight of the Negro in our economy", *Weber* at 202, and the primary objective of the statute was to "break down old patterns of racial . . . hierarchy." *Id.* at 208. Unquestionably the consent decree in this case advances this primary objective, by opening the doors of the coveted supervisory ranks to minority officers for the first time in the history of the fire department.

The fact that the consent decree represents a settlement and thereby advances the voluntary compliance objectives of Title VII is itself a factor which the district court was entitled to weigh in assessing whether the consent decree was consistent with the statutory objectives of Title VII. *See e.g., Carson*, 450 U.S. at 88 n.14.

tims and approval of the settlement was well within the discretion of the district court. (See Part II C.4. above).

The consent decree was specifically tailored to afford relief only to minorities who were employees of the fire department prior to the date that the consent decree was approved by the district court. (J.A. 80). The three years in-grade requirement in order to compete for promotion to the rank of lieutenant ensures the implementation of this intent [44] and the promotions actually made to date under the consent decree clearly confirm the likely victim status of those promoted.[45]

[44] See Paragraph 5 of the decree. (Pet. App. A33) The consent decree was approved by the district court on January 31, 1983. No firefighter hired after December 16, 1982 would have had the three years in-grade sufficient to enable him to compete for a ranking on the two year December 16, 1985 eligible list, the last list covered by the consent decree.

[45] All of the eight minority individuals promoted to upper level supervisory ranks in 1983 initially came to the fire department before 1965. Of the thirty-three minorities promoted to lieutenant positions in 1983, fourteen were appointed before 1973, twelve were appointed in 1973, six were appointed in 1977, and one was appointed in 1979. Of the eight minority individuals promoted in the second round of promotions under the decree, three were initially appointed in 1973 or earlier, three were initially appointed in 1977 and two were appointed in 1981.

All of these beneficiaries of the decree were victims of the racial isolation and atmosphere of hostility that existed in the fire department until at least 1983. The impact of this factor on their development of the skills needed for promotion and on their motivation to compete cannot be measured, but no doubt was significant. In addition, the individuals initially appointed in 1977 or earlier all were victims of the abuses surrounding the 1975 examination and its use. (Based on the three years time-in-grade requirement then in effect, the individuals appointed in 1977 should have been eligible to take an examination that would have resulted in certification of an eligible list in November, 1980 or thereafter.) Many were also victimized by earlier promotion practices. In addition, the individuals hired in 1973 and 1977 were the first two groups of minority recruits taken into the department under the prior hiring litigation and it is likely that they would have been hired earlier, and thus

IV. THIRD-PARTY INTERVENORS DO NOT HAVE ABSOLUTE VETO POWER OVER TITLE VII SETTLEMENTS.

Local 93 and its amici argue that consent decrees cannot be approved unless all third-party intervenors agree to the remedy. This argument misapprehends the nature of the rights of such intervenors and the scope of their intervention.[40]

A number of appellate courts have had the opportunity to consider settlement agreements advanced in the face of

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promoted earlier, in the absence of both hiring and promotion discrimination.

The promotion chances of all of the individuals benefited by the decree, including those hired after 1977, were hurt by the city's previous promotion of whites who would never have been promoted in a fair, non-discriminatory process. The individuals who should have received those promotions, whether minority or non-minority, remained in the pool of candidates competing for post-decree promotions. As a result, the group of pre-decree incumbents is less qualified than would have occurred in a non-discriminatory environment and the group of post-decree competitors for promotions is more qualified. All minorities competing for promotions in the near future will be victims of this over-qualified pool, a direct result of past discrimination.

[40] Under the theory advanced by the Department of Justice, Br. at 26-27, an intervenor would be able to veto any consent settlement, regardless of whether it included non-victim-specific affirmative measures. Thus, even settlements involving the "slotting in" of identified victims would be rendered virtually impossible, since an intervenor would be unlikely to agree to the placement of a victim ahead of the intervenor. Moreover, it appears that under the Department's theory, the issue of liability could never be settled over the objection of an intervenor, since to do so would mean that beneficiaries of the settlement were not "proven victims" of discrimination.

In addition, it is difficult to envision any entitlement to object in an intervenor that is greater than the entitlement of a class member to object to a class settlement. Logically, if an intervenor should be entitled to veto a settlement, so too should a class member. The net result of such an argument may be to create an insurmountable barrier to Title VII settlements in direct contravention of the intent of Congress. See Part I.D. above.

objecting intervening parties. The courts of appeals uniformly hold that:

> . . . although non-minority third parties allowed to intervene in cases which involve consent decrees or settlement agreements implementing race-conscious hiring or promotional remedies do have a sufficient interest to argue that the decree or agreement is unreasonable or unlawful, their interest in the expectation of appointment does not require their consent as a condition to any voluntary compromise of the litigation.[41]

These rulings are consistent with the purpose of Rule 24 intervention, which is to allow a third party to assert its legal rights in the subject matter of the action. Under Rule 24, intervention of right is allowed only when the applicant has a legal right which may be impaired by the disposition of the action. *See e.g., Donaldson v. United States*, 400 U.S. 517, 531 (1971); *United States v. 36.96 Acres of Land*, 754 F.2d 855, 858-59 (7th Cir. 1985) (*appeal pending*); *New Orleans Public Service v. United Gas Pipe Line*, 732 F.2d 452, 463 (5th Cir. 1984), *cert. denied*, ——— U.S. ———, 105 S. Ct. 434 (1984). The scope of the intervenor's right to veto a settlement is limited by the intervenor's legal rights at stake. If the settlement deprives the intervenor of no legal right, then the intervenor has no veto power.

The legal rights of intervenors such as Local 93 are defined by Title VII, the Constitution and any applicable collective bargaining agreement. Neither Title VII nor the Constitution gives non-minority individuals an absolute right to prevent their employers from utilizing af-

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[41] *Kirkland v. New York State Dept. of Corr. Servs.*, 711 F.2d 1117, 1126 (2d Cir. 1983), *cert. denied*, 465 U.S. 1065 (1984). *See also, Dennen v. Pontrich*, 600 F.2d 70, 74-76 (7th Cir. 1979); *Airline Stewards v. American Airlines, Inc.*, 573 F.2d 960, 964 (7th Cir. 1978), *cert. denied*, 439 U.S. 926 (1978); *EEOC v. American Tel. & Tel. Co.*, 556 F.2d 167, 173 (3d Cir. 1977); *In re Fine Paper Litigation v. State of Washington*, 632 F.2d 1081, 1087 (3d Cir. 1980).

firmative numerical remedies.[50] Thus, so long as affirmative provisions of the settlement satisfy the standards set forth in the *Weber* and *Bakke* cases,[51] the intervenor ordinarily [52] should have no power to veto the settlement.

V. THE CONSENT DECREE DOES NOT CONFLICT WITH ANY CONTRACTUAL OBLIGATIONS OF THE CITY AND DOES NOT ABROGATE ANY RIGHTS UNDER A "BONA FIDE SENIORITY SYSTEM".

Amicus Department of Justice alleges that the consent decree deprives non-minority workers of rights under a

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[50] To the contrary, *Weber* explicitly holds that Title VII confers no such absolute legal right, and the opinions of five members of the Court in *Bakke* indicate that no such right exists under the Fourteenth Amendment.

[51] Of course, the criteria enunciated in *Weber* and *Bakke* require that the interests of third parties be taken into account. It is appropriate for intervenors such as Local 93 to participate for the limited purpose of addressing these issues. Contrary to the argument of amicus Department of Justice, the fact that the intervenor participated under Rule 24(a) for this limited purpose does not lead to the conclusion that they should be given an absolute veto. Rule 24(a) itself vests no rights in the intervenor. Rather Rules 24(a) and (b) simply set forth alternative standards which affect the discretion of the district court to decline intervention. As discussed in Part I above, the consent decree appropriately balances the interests of Local 93's non-minority members, as the district court and the court of appeals both found.

[52] Amicus Department of Justice argues that the Fifth Circuit has given unions an absolute veto power over settlement agreements. Br. at 27 n.24. This is not true. The cases cited permit the union to participate in the liability phase of the proceeding only when the proposed remedy overrides seniority rights which is consistent with plaintiff's reading of *Stotts* and with the *W.R. Grace* decision, *see* note 32, *below*. As discussed at Part III above, this case does not raise the question of the standard of review to be applied to consent decrees that extinguish collectively-bargained or other contractual rights of non-minorities.

Moreover, contrary to the argument of the Department of Justice, Br. at 26, an intervenor union is not bound by a consent decree to which it is not a party. *See* Brief for National League of Cities, et al. as Amici Curiae at Part A; Brief for City of Atlanta, et al. as Amici Curiae at n.13.

"memorandum of understanding" that in its view constitutes a collective bargaining agreement. Br. at 1, 25. This issue is not before the Court. Local 93 has never alleged that the consent decree interferes with any contractual rights and there is nothing in the record to support such a contention.[53]

If the Court concludes that it is appropriate to reach the issue of contractual obligations,[54] the city's position that there is no conflict between the decree and the memorandum of understanding is entitled to substantial weight. Simply put, the memorandum of understanding does not control, nor does it purport to control, the promotion process. As a matter of law, practice and pursuant to the language of the memorandum of understanding, the subject of promotions has been left to manage-

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[53] Amicus Department of Justice asks the Court to assume that the failure to include the memorandum of understanding in the record "is due to improper procedures followed by the district court, *i.e.*, the entry of a judgment without proper adjudication and over the objection of one of the parties." Br. at 2. This characterization is contradicted by the record.

[54] Local 93 makes a weak suggestion that the city's obligations under the Ohio public employees collective bargaining statute "might be avoided." Br. at 16, n.8. However, the statute expressly exempts the establishment of eligible lists and the award of promotions from those lists. Ohio Revised Code § 4117.08. Furthermore, this statute became effective after the date of entry of the consent decree. In addition, the decree is required to "be read in harmony with . . . [statutes] if such a reading is possible and reasonable and will not frustrate the purposes of this decree." (Pet. App. A37)

Moreover, the consent decree does not purport to relieve the City of any contractual obligations. The only language dealing with a possible conflict between the consent decree and other obligations does not mention contracts, but only provides that the decree shall prevail over "any state constitution, statute, charter provision, city ordinance or administrative rule." Thus even if a conflict were to exist between the decree and a collective bargaining or contractual obligation, the decree does not explicitly relieve the city of such obligations, and under the holding of *W.R. Grace & Co.*, the city presumably would remain liable to the union for any default under the contract.

ment.[5] If however, the Court concludes that the question of contractual obligations should be reached and finds uncertainty in the intent of the memorandum of understanding, the proper action would be to remand to the district court for factual findings concerning the existence and nature of such obligations.

Local 93 argues for the first time in this Court that the decree deprives its members of seniority rights. This argument is likewise not properly before the Court. While the question of the continued use of length of service credits was placed in issue by plaintiff's complaint (J.A. 11) and the first proposed consent decree (J.A. 32-33), Local 93 did not raise this argument in the courts below. Not only was Petitioner clearly on notice of this issue, it had numerous opportunities to develop the record in this regard. Indeed, prior service credits were ordered restored in the amended consent decree as a concession to the Petitioner.[6]

Moreover, on the merits, Local 93's argument is both legally and factually incorrect. Under the consent de-

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[5] At the time the consent decree was entered, public employee bargaining was not authorized under Ohio law. R.C. § 4117.01 *et seq.* (eff. April 1, 1984). Prior to the change in Ohio law, local governments sometimes entered into memoranda of understanding with their employees which were of questionable enforceability. However, promotions are controlled by the Charter of the City of Cleveland and the Civil Service Commission rules. Memoranda of understanding between Local 93 and the City of Cleveland have always taken a "hands off" policy towards promotions, making it clear that there is no intent to disturb ordinary civil service rules and processes. The current memorandum of understanding between the city and Local 93 expressly acknowledges that promotions are a management prerogative. As a matter of Ohio law, promotions and the rating and selection of civil service candidates are subjects which are "prohibited", i.e., "cannot be bargained". R.C. § 4117.08; Lewis & Spirn, *Ohio Collective Bargaining Law*, at 59 (1983).

[6] This is the very type of argument which Petitioner should not be permitted to advance *ab inititio* in this Court. *See e.g., Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 759 n.6 (1984); *Rogers v. Lodge*, 458 U.S. 613, 628 n.10 (1982); and *Dothard v. Rawlinson*, 433 U.S. 321, 323 n.1 (1977).

cree, prior service credits are added to examination scores exactly in accordance with the formula previously utilized.[7] The city's use of prior service credits as a "minor factor" (Br. of Pet. at 25) in the promotion process did not establish a "seniority system" under § 703(h) of Title VII. Seniority systems are not defined in Title VII, but rather are created by private parties and must include ancillary rules that define length of service. *California Brewers Association v. Bryant*, 444 U.S. 598, 605, 607 (1980). A seniority system normally is established in a collective bargaining agreement. However, in this case, no collective bargaining agreement exists, and the memorandum of understanding says nothing about prior service credits in promotions.[8]

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[7] Examination scores and not prior service credits determine whether an applicant is entitled to a place on an eligible list. Prior service does affect the relative ranking of those persons on the eligible list who have less than fourteen years of service with the fire department. An applicant receives "one percent of the total grade obtainable for each of the first four years of prior service and six-tenths percent of the total grade for each year of the next ten years of prior service. . . ." Rule 4.09-C, Civil Service Commission Rules.

[8] The fact that an employer on its own establishes a practice or rule that utilizes a measure of seniority for some purposes does not mean that such unilateral rules constitute a "seniority system". Title VII's protection of bona fide seniority systems originated in "this Nation's longstanding labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment." *California Brewers*, 444 U.S. at 609 (emphasis added). *See also*, Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 Harv. L. Rev. 1532, 1534 (1962) (seniority is "the product of collective bargaining; it owes its very existence to the collective bargaining agreement"; cited in *California Brewers*, 444 U.S. at 606 n.14). *But see, Williams v. New Orleans Steamship Ass'n*, 673 F.2d 742, 754 & n.21 (5th Cir. 1982), *cert. denied*, 460 U.S. 1038 (1983); *EEOC v. E.I. DuPont de Nemours & Co.*, 445 F. Supp. 223, 249-49 (D. Del. 1978).

Even if § 703(h) protects unilateral uses of seniority, that section does not prevent the employer that created the system from modify-

In addition, the decision in *California Brewers* specifically indicates that § 703(h) will not "be given a scope that risks swallowing up Title VII's otherwise broad prohibition on 'practices, procedures or tests' that disproportionately affect members of those groups that the Act protects." 444 U.S. at 608. Where a seniority system "provides that . . . promotions are to be determined by a mix of seniority and other factors . . . [this] does not mean that [those other factors] would also be covered [by § 703(h)]." 444 U.S. at 606, n.13. In this case, the consent decree did not affect the use of length of service credits, which was specifically continued, but rather changed the weight given to other factors in the promotion process that are not covered by Section 703(h), *i.e.*, test scores and rank on the eligible list. Thus, even assuming that continued use of length of service credits is somehow mandated by § 703(h), that mandate does not extend to other factors in the promotion process.

VI. THE CONSENT DECREE WAS PROPERLY APPROVED BY THE DISTRICT COURT PURSUANT TO ITS AUTHORITY UNDER SECTION 1981 AND THE FOURTEENTH AMENDMENT.

This case has never been perceived by the parties or by the courts as solely a Title VII action. The complaint was brought and the consent decree was adopted and upheld under multiple statutory and Constitutional provisions.[17] More specifically, these alternative bases in-

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ing or eliminating the system. Rather, Title VII recognizes that the nature of the particular system is determined by the party or parties that created it. *California Brewers*, 444 U.S. at 605-08. Thus, in this case, the City that unilaterally created the system was free to modify it if necessary to comply with the consent decree.

[17] (Pet. App. A32) Amicus Department of Justice asserts that the court of appeals did not rely on the Fourteenth Amendment in upholding the decree and consequently that the Court should not reach this issue. To the contrary, the court of appeals explicitly held that the consent decree satisfied Fourteenth Amendment standards for voluntary affirmative action. *See* Pet. App. A9-A3 and

clude 42 U.S.C. § 1981 and the equal protection clause of the Fourteenth Amendment. As discussed at p. 32 above, the Court's decisions leave no doubt that non-victim-specific affirmative action is authorized as a remedy for Fourteenth Amendment violations.[18] Even if there are limitations placed upon race-conscious relief under Title VII actions by § 706(g), such limitations do not apply to § 1981 nor to the Fourteenth Amendment.[19]

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n.1 (specifically relying on Fourteenth Amendment precedents and citing *Weber* only as an analogy). Moreover, the district court recited that the case was brought under 42 U.S.C. § 1983 (the jurisdictional basis for enforcing the Fourteenth Amendment) and in approving the decree cited authorities under both Title VII and the Fourteenth Amendment. (City App. A5)

[18] The Fourteenth Amendment authority for this remedy is discussed in greater detail in the Brief for National Conference of Black Mayors, Inc. as Amicus Curiae at 3-23. Amicus Department of Justice suggests that the consent decree was not authorized under the Fourteenth Amendment because it was based on the disparate impact type of Title VII liability. To the contrary, plaintiff's claim was not merely that unvalidated written tests were used, but that the hiring, promotion and assignment procedures were all intentionally manipulated to favor whites. *See* pp. 2-5 above.

[19] *See Commonwealth of Pennsylvania v. Local Union 542, Int'l Union of Operation Engineers*, 28 FEP Cases 673, 676 (3d Cir. 1982), *cert. denied*, —— U.S. ——, 54 U.S.L.W. 3461 (January 14, 1986) specifically holding § 706(g) inapplicable to race-conscious relief under § 1981. See also the discussion of the broad scope of § 1981 in Respondent Williams, et al. Brief in Opposition, *Commonwealth of Pennsylvania*, No. 85-828 at 11-13.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

Lieutenant Appointments from 1981 Examination

	Promotions That Would Have Occurred In Absence of the Decree	Promotions Under the Decree			
		Immediate (2-10-83)	(5-23-83)	Subsequent	Total
Total	40	66	33	10	109
Minority	3	33	0	0	33
Non-Minority	37	33	33	10	76

Upper Level Appointments from 1981 Examination

	Promotions That Would Have Occurred In Absence of Decree			Promotions Under The Decree						
				Immediate		Subsequent		Total		
	M	NM	Total	M	NM	M	NM	M	NM	Total
Capt.	1	19	20	3	29	0	20	3	49	52
Batt. Chief	0	10	10	1	13	6	10	3	23	26
Assist. Chief	0	3	3	2	2	0	1	2	3	5

REPLY

BRIEF

No. 84-1280

Supreme Court, U.S.
FILED
FEB 10 1986
CLERK

In The

Supreme Court of the United States

October Term, 1985

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, C.L.C.,

Petitioner,

vs.

CITY OF CLEVELAND, *et al.*,

and

VANGUARDS OF CLEVELAND

Respondents.

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

Throughout their briefs, both Respondents City of Cleveland and Vanguards of Cleveland have attempted to interject alleged facts which were not part of the record herein, and are false, inflammatory and misleading.

Additionally, both Respondents have taken great liberty in interpreting the facts that were part of the record to fit their needs.

In order that this case be fairly considered, Petitioner Local 93 finds it necessary to briefly respond to some of the unproven and nonetheless irrelevant allegations contained in Respondents' briefs.

Petitioner further finds it necessary to respond to both Respondents' arguments endeavoring to turn the focus in the instant case away from Title VII considerations and toward a basis of decision not relied upon by the Court of Appeals below.

Finally, we respond briefly to suggestions that the incorporation of the discriminatory promotional scheme in a consent decree does not affect the rights of innocent third parties and that the instant decree should not be subject to the limitation of § 706(g) of Title VII.

ARGUMENT

I. BOTH RESPONDENTS HAVE ATTEMPTED TO INTERJECT UNPROVEN FACTUAL ALLEGATIONS WHICH ARE FALSE, MISLEADING AND INFLAMMATORY.

At the very outset of their brief, the Respondent, City of Cleveland, states:

> "The evidence in the record before this Court is uncontroverted and unassailable that:

1. Two federal district court judges had previously determined that the hiring and promotion practices of the City Department of Public Safety, including its Division of Fire, violated the Thirteenth and Fourteenth Amendments and 42 U.S.C. §§ 1981 and 1983. Exh. 15-B-E., Exh. 16-B-E.

2. The City was operating its Police and Fire Divisions under consent orders prescribing hiring or promotion quotas when this case was filed. Exh. 16E; Exh. 15C." (Br. City at 13)[1]

The foregoing statements constitute a thinly veiled attempt to skew the facts of the present case. Regarding the City of Cleveland Division of Fire, it has never been previously determined by any court that their *promotional* practices were in violation of the Thirteenth and Fourteenth Amendments or 42 U.S.C. §§ 1981 and 1983. Further, the Division of Fire was, prior to initiation of the present case, operating only under Court order proscribing *hiring* quotas, not promotional quotas.

In *Shield Club v. City of Cleveland*, Civil Action No. 72-1088 (N.D. Ohio) the court imposed quotas for hiring and promotions upon the Cleveland Police Department after finding violations of the Thirteenth and Fourteenth Amendments and 42 U.S.C. §§ 1981 and 1983. The case of *Headen v. City of Cleveland*, Civil Action No. 73-300 (N.D. Ohio) dealt only with discrimination in *hiring*, within the Cleveland Division of Fire, and resulted in a 1973 order requiring hiring quotas. The issue of alleged discrimination in promotions within the Division of Fire was not addressed.

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[1]References to the Brief for the City of Cleveland will be cited herein as Br., City, followed by the page number. Brief for the Vanguards of Cleveland will be cited as Br., Vang.

The brief of the Respondent Vanguards of Cleveland is similarly replete with attempts to interject alleged facts which were not part of the proceedings below and are false, misleading and inflammatory.

The Vanguards make reference to certain factual allegations that they would have established "[h]ad this case proceeded to trial . . ." (Br. Vang. at 3, N.2). These include bare assertions the City took actions such as the alleged mistaken hiring of a black by the City because they believed he was white; and his demotion upon their discovery that he had black relatives; refusal to hire minorities because they were too tall, too short, flat-footed, or because their nostrils were too large (Br. Vang. at 3, N.2); relegating blacks to "black beds" in their firehouses; exclusion of blacks from study classes for promotional examinations (*Id.*, at 4, N.3); and finally, manipulation of retirement dates in order to exclude blacks from promotion. (*Id.*, at 5).

It is indeed ironic that the Respondents now attempt to introduce alleged facts which they claim they would have proven had this matter gone to trial. As the record clearly reflects, it was they that sought termination of the instant suit in the lower Court short of trial where their assertions of discrimination would have been subject to cross-examination and counter-evidence by the Petitioner-Intervenor, Local 93. Such attempts to interject facts before this Court by way of footnote highlights the total absence of proof before the lower court of any discriminatory practices relating to promotions, whether purposeful or not,

within the Division of Fire. Had this matter indeed proceeded to trial, it is nowhere clear whether the Vanguards could have sustained their burden of proving even a *prima facie* case of racial discrimination in the past promotional practices on the part of the Respondent City of Cleveland.

The Vanguards go on to assert that after the order in the *Headen* case establishing minority hiring quotas, the City "... manipulated the promotion process ..." and refused to hold promotional examinations for a period of six and one-half years. (Br. Vang. at 5) Nothing could be further from the truth or more misleading. In the District Court, the Vanguard's own witness, Lloyd Noles, testified that a promotional examination given in 1975 was "tied up in litigation."[2]

Finally, without any proof whatsoever, the Vanguards allege that the 1984 and 1985 promotional examinations are of doubtful validity and ". . . produced a

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[2]The litigation referred to by Mr. Noles in fact had nothing to do with any claim of racially biased testing. Rather, due to an administrative error, examination books were found to have pages missing and juxtaposed so that questions designed for one rank appeared in the test for a different rank. Throughout the period from 1972 to 1980, Petitioner Local 93 constantly implored the City to conduct additional tests. See Appendix 1.

severe adverse impact on minorities." (Br. Vang. at 17 X.22).[3]

Indeed, had the matter properly been heard, and the petitioner been given an opportunity to litigate this case, petitioner would have provided this Court with substantial evidence refuting any claimed intentional racial discrimination in promotions within the Cleveland Division of Fire. However, because in the District Court the City agreed to a generalized finding of discrimination in promotions with the Department, and the Court entered the order as a "consent decree," *no proof was ever adduced.* Petitioner therefore urges that the repeated attempts to introduce unproven factual allegations by both respondents be disregarded.

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[3]An additional point should be made as to the unique nature of promotional tests given to the fire service. The questions, prepared by qualified private testing firms, are drawn directly from specific firefighting texts and treatises which have been proscribed in a list published by the Cities Civil Service Commission, are directly related to job performance, and all questions can only come from these books. They are available to everyone and only the amount of study by the individual candidates is left to his discretion. Tests must meet certain basic standards as enunciated in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

It is inconceivable how anyone could sustain a *Griggs* type challenge to these firefighter promotional tests. It is obviously the reason, coupled with the fact that two of the three tests utilized under this consent decree were contractually prepared and administered by minority testing firms, that no such challenge has been brought by the Vanguards to date.

It can be argued under the rationale of *Washington v. Davis*, an intentional showing is in fact necessary to Title VII challenges to specific promotional tests. See *Davis v. Washington*, 348 F. Supp. 15 at p. 17.

II. THE PRESENT CASE CANNOT BE DECIDED UNDER TITLE VII PRINCIPLES APPLIED TO TRULY VOLUNTARY ACTIONS.

The case upon which respondent place primary reliance, *United Steelworkers of America, AFL-CIO, C.L.C. v. Weber*, 443 U.S. 193 (1979) does not involve Title VII, § 706(g)(f) and is inapplicable to the case at hand. In *Weber*, this Court upheld a wholly voluntary provision in a collective bargaining agreement between a union and a private employer providing for reservation of 50% of the available slots in a craft training program for minorities. In *Weber* there was no dissenting party, contrary to the case herein.

The issue before the Court in *Weber* was a narrow one and differed significantly from the case at hand. Justice Brennan stated:

> "[W]e are not concerned with what Title VII requires or with what a court might order to remedy a past proven violation of the Act. The only question before us is the narrow statutory issue of whether Title VII *forbids* private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences . . ." *Weber*, 443 U.S. at 200.

Despite the efforts of the Respondents to construe the facts herein otherwise, the present case undeniably involves a court-ordered remedy. Rather than face costly and protracted litigation the City admitted to a generalized determination of racial discrimination. Therefore, the facts of the present case make *Weber* inappropriate.

In contrast, since the decree indisputably is an "order of the court" requiring the promotion of non-victims of

discrimination, Section 706(g) 's bar of such relief is directly in point. The fact that the order was entered with the "consent" of two of the three parties to this action does not render it any less an order, nor does it ease the burden on non-minority employees.

Indeed, the incorporation of a voluntary plan in the decree has enormous consequences for such innocent third parties by insulating from judicial review subsequent actions taken which disadvantage innocent third parties, but purportedly are taken pursuant to the decree.

III. A COURT ORDERED DECREE IS NOT THE EQUIVALENT TO VOLUNTARY AFFIRMATIVE ACTION PLANS.

Respondents and several *amici curiae* contend that "for purposes of affirmative remedies, a consent decree is equivalent to other voluntary affirmative action plans." (Br. Vang. at 20; *see also amicus brief*, National League of Cities, *et al*, at 24, ". . . the fact that an affirmative action plan is embodied in a consent decree will be a matter of indifference to non-minority employees.")

This is simply not the case, for innocent third parties, it is far from a "matter of indifference" whether their rights are violated by court order or private agreement. Third parties injured by a consent decree are often, as in this matter, precluded from collateral attack of a court order. *See, e.g.*, including the Sixth Circuit, *Stotts v. Memphis Fire Dept.*, 679 F.2d 541, 555 (6th Cir. 1982), *Thaggard v. City of Jackson*, 687 F.2d 66 (5th Cir. 1982), *see also, Dennison v. Los Angeles Department of Water & Power*, 658 F.2d 694 (9th Cir. 1981). Indeed, the decree here purports to broadly preclude any attack. (Decree, Para. 24, Pet. App. A-38).

Thus, when a "remedial" racial quota takes the form of a consent decree, under the prevailing law, third parties will never have an effective opportunity to protect their rights.

Unlike a consent decree however, a settlement agreement entered pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, or any other voluntary private agreement does not preclude an injured third party from commencing a lawsuit to protect his rights. *Donovan v. Robbins*, 752 F.2d 1170, 1176 (7th Cir. 1985). In contrast, when a discriminatory scheme is incorporated in a "consent" decree, those actually injured by the decree are effectively barred from challenging it. Thus, whether a scheme is incorporated in a decree determines whether or not third parties can ever invoke the judicial system to protect their own Title VII rights.

Since a decree or order of court imposing discriminatory protection has a far greater impact on the rights of innocent third parties than does a purely private agreement, it was perfectly logical for Congress, as it does in § 706(g) of Title VII, to specifically prohibit quota relief, even if such relief might have possibly been permissible in a private agreement.

A. A decree provides an employer with incentive to settle discrimination claims without regard to innocent third parties.

It can readily be seen that the protection of a decree or order of court provides an employer a safe haven from a multitude of suits by innocent third parties. This provides great incentive to an employer, such as the City of

Cleveland to quickly agree to a basic generalized finding of discrimination and proceed to settlement, rather than protect the constitutional and/or statutory rights of innocent third parties.

Incorporation of an affirmative action hiring quota also insulates the public employer from control by state law, e.g., civil service rules are preempted. Further, the agreement is shielded from political revision and the public employer is free from all pressures of the political process. Moreover, the decree by its very terms insulates the process from future renegotiation or attack under the collective bargaining process.

As *Weber* shows, certain affirmative action agreements may be enforceable under contract principles. Thus, the issuance of a decree is not needed to allow voluntary affirmative action. Rather, it is employed to prevent an injured third party from subsequently challenging the agreement under Title VII safeguards. Even though the issuance of a decree may facilitate certain kinds of settlements, it does so by insulating the settlement from attack by those whose rights it necessarily trammels.

It is obviously advantageous to the members of the preferred racial group and the "race-in" defendant-employer when illegal quota relief is incorporated into a binding decree. The decree enjoys an unusually high level of protection from subsequent legal challenge by innocent third parties disadvantaged by the court's discriminatory order.

Therefore, the interests of third parties will not be adequately protected under the standards applied in *University of California Regents v. Bakke*, 438 U.S. 265, 307-

310 (1978), (Powell, J.) and *United Steelworkers v. Weber*, 443 U.S. 193, 208-209 (1979), "if agencies charged with discrimination may simply "cave-in" to the allegations • • • • *Bushey v. New York State Civil Service Commission*, 84-336, Jan. 7, 1985, (slip op. at 5), 53 U.S.L.W. 3477, 3478 (U.S. Jan. 8, 1985) and third parties are barred from effectively asserting their rights in subsequent proceedings. In any case, Congress has protected the interests of the third parties by prohibiting court ordered quotas, and has made no exception where the employer "cave-in" to the proposed discriminatory system.

B. Contrary to the assertions of Respondents and some amici, a Court may not enter a decree contrary to statutory authority.

Respondents and some amici contend, citing *Swift & Co. v. United States*, 276 U.S. 311 (1928) that a court may rely on the consent of the parties to enter an order clearly forbidden by the statute initially sought to have been enforced (Br. Vang. at 28; Brief *amici*, National League of Cities, *et al*, at 19-21).

Petitioner in response, believes that respondents give an overly-expansive reading to *Swift*, where the court rejected a subsequent collateral attack to an existing decree. However, the court recognized that had a party objected to and initially appealed the original entry of the order, (as Petitioner Local 93 did at every stage of the present proceedings), the order may have been corrected on appeal. *Swift*, therefore, is a decision merely limiting the scope of subsequent collateral attacks on a decree and points out the rights of the parties to seek correction of legal errors on appeal.

Thus, *Swift* simply does not stand for the proposition that a federal court may order anything as long as one interested party consents and the Court has subject-matter jurisdiction.

This argument is pure fantasy as it would enable a racist white group and an employer to consent to the entry of a "Title VII" order barring the hiring of blacks and insulate that order from revision on appeal because "even gross error in the decree will not render it void." (Id., at 230). But such is not the case and the consent of two parties does not protect an illegal and unconstitutional decree from a timely appeal by an aggrieved third party.

Thus, far from demonstrating the invincibility of a consent decree on appeal, *Swift* demonstrates the importance of insuring that agreements entered as decrees must absolutely conform to the law.

IV. THE DECREE CANNOT BE SUPPORTED ON THE GROUNDS OF THE THIRTEENTH AND FOURTEENTH AMENDMENTS AND 42 U.S.C. §§ 1981 and 1983.

Throughout their briefs, both the City of Cleveland and Vanguards have advanced the argument that the lower court's order was entered under the authority of the Thirteenth and Fourteenth Amendments, 42 U.S.C. §§ 1981 and 1983 (Br., City at 16), and that the Court of Appeals approved the order on these alternate grounds. However, nowhere in its decision does the lower Court mention these grounds.

Both Respondents and some of the *amici* in support of their position have attempted to minimize the role of

Title VII in the lower Court's decision and analyze the case by standards not even considered by the lower Court.

While Petitioner asserts that this Court need not and should not reach the constitutional questions raised by their perceived "alternative grounds" of the decision by the Court of Appeals, these arguments will be addressed briefly herein.

A. The Circuit Court's decision did not rely on alternative Constitutional grounds.

The Respondents have attempted to argue in their briefs that, notwithstanding Title VII, the decree herein satisfies the established standards for affirmative action remedies under the Thirteenth and Fourteenth Amendments and 42 U.S.C. §§ 1981 and 1983.

The record, in its current form, cannot sustain the conclusion that the Constitution authorizes such relief under any conceivable standard. Before a racial classification may be sustained as an exercise with the Court's constitutional powers, a court must at least consider the propriety of the order under the standards applicable for invocation of these powers, and under the framework established by the appropriate Constitutional provision. This did not occur below, and should not take place here in the absence of a record on the issues. The case was argued and decided below under Title VII, and it is a Title VII issue that is presented for review. Nowhere in its decision does the lower court expressly or implicitly rely or even make reference to in passing any constitutional grounds whatsoever.

In any event, neither the District Court nor the Court of Appeals made any finding that the City bore its burden

of justifying the decree's racial classification under the Constitution. It is inappropriate to speculate as to what showing might have been made if the lower courts permitted litigation of the case and considered the constitutional issue.

Proof of intentional discrimination is a prerequisite to relief under constitutional provisions. *Washington v. Davis*, 426 U.S. 229 (1976). Nowhere in the record of the District Court or the lower court is there any mention of evidence or a finding of intentional discrimination.

B. Even under an analysis of the Thirteenth and Fourteenth Amendments and 42 U.S.C. §§ 1981 and 1983, the decree herein is invalid.

In alleging that the decree herein satisfies the requirement of the Thirteenth and Fourteenth Amendments, and 42 U.S.C. §§ 1981 and 1983, the Respondents rely heavily upon the inappropriately categorized "trilogy" (Br. Resp. at 13 N.15) of *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979); and *Fullilove v. Klutznick*, 448 U.S. 884 (1980). The Respondents allege that the decree herein must be analyzed solely within the framework of these three cases. However, Petitioner submits that this "trilogy" is merely an incomplete part of a series of cases which, when properly analyzed, reveal the impropriety of the challenged decree. Glaringly absent from the Respondent's briefs was any mention of another and perhaps more relevant "trilogy" consisting of *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976); *International Brotherhood of Teamsters v. United States*,

431 U.S. 324 (1977); and *Firefighters Union No. 1784 v. Stotts*, — U.S. —, 104 S. Ct. 2576 (1984).

However, even under the Respondents limited and convoluted framework of *Bakke*, *Weber* and *Fullilove*, the decree herein is patently invalid because it affords relief beyond that permissible by the Thirteenth and Fourteenth Amendments and 42 U.S.C. §§ 1981 and 1983, which relief unnecessarily trammels the rights and interests of innocent non-minorities.

Bakke stands for the proposition that classifications based on race, such as the instant case, can only be justified by a compelling state governmental interest, and must be absolutely necessary to the accomplishment of that compelling interest.

Fullilove also relied on by Respondents herein, is clearly distinguishable from this Court's opinion in *Bakke*. *Fullilove* dealt specifically with Congress' unique and inherent powers, coupled with the signature of the President, under the Fourteenth Amendment.

Congress outlined a compelling need to establish a racial classification to address what it perceived to be a national problem, exclusively within their legislative purview. This Court appropriately has always given strong deference to such classifications and, only here, has been reluctant to apply the traditional strict scrutiny standard. *Blodgett v. Holden*, 275 U.S. 142, 148, 72 L.Ed. 206, 48 S. Ct. 105 (1927).

As justice Powell stated in *Fullilove*:

> Again we stress the limited scope of our inquiry. Here we are not dealing with a remedial decree of a court let with the legislative authority of Congress. (*Id.*, 448 U.S. 448, 480).

This analysis underscores the fact that unlike the strict scrutiny test, a slightly relaxed standard was used labelled "close examination" (*Id.*, at 472).

Bakke, is clearly state action and not a court, state, legislative or administrative agency, but merely the Admissions Committee of a state university making a crucial decision regarding past discrimination, and then attempting to constitutionally proscribe quota relief to the detriment of non-minorities. Although neither *Bakke* or *Fullilove* resulted in majority opinions, five Justices indicated that where classification is based on race, the "strict scrutiny" standard of review should be applied.[4] *Bakke* made clear that the strict scrutiny test will be applied even when the party seeking protection is not a "discreet and insular minority." *Bakke*, 438 U.S. at 298. The Court stated (438 U.S. at 295-296) "The guarantee of equal protection cannot mean one thing when applied to a per-

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[4] In his plurality opinion in *Bakke*, Justice Powell stated: (438 U.S. at 291: "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." Justice White joined in this position of the opinion. *Id.*, at 387 n.7.

In *Fullilove*, Justice Stewart joined by Justice Rehnquist stated (448 U.S. at 523): "Under our Constitution, any official action that treats a person differently on account of his race or ethnic origin is inherently suspect and presumptively invalid."

Justice Powell, concurring stated: (*Id.*, at 496): "racial classifications must be assessed under the most stringent level of review because immutable characteristics which bear no relation to individual merit or need, are irrelevant to almost every governmental decision." Justice Stevens in a separate dissenting opinion advocated strict scrutiny review of classifications based on race. (*Id.*, at 548).

son of another color. If both are not accorded the same protection, then it is not equal.

Whether the relief accorded to minorities by the decree herein be termed quotas or "numerical remedies" (Br. Vang. at 11), it still remains relief accorded to persons based on classification due to race or ethnic background, and therefore, the strict scrutiny test should be applied.

C. The decree exceeds the bounds of permissible court relief under the constitution.

This Court has always held that a remedy must be narrowly tailored to fit "the nature and extent of the violation" proven. *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 420 (1977). The decree in the present case does not take into account either the identity of any alleged discriminatee nor the effect or extent of any claimed discrimination. Even the Respondent Vanguards can only state that the decree ". . . exhibits a *high probability* of benefitting those persons who were actually victimized by prior discrimination at the hands of the City." (Br. Vang., at 19) (emphasis added). If this is true, the probability is equally high that an innocent non-minority who has not discriminated, worked and studied hard for promotion will nonetheless suffer loss of promotion and all the tangible benefits that go with it because of the over-expansiveness of the decree. As Justice Stewart stated in *Fullilove* (448 U.S. at 530 N.12): "Except to make whole the identified victims of racial discrimination, the guarantee of equal protection prohibits the government from taking detrimental action against innocent people on the basis of the sins of others of their own race." We hereby adopt fully, towards this proposition, pp. 6 and 7, Brief *Amicus*, filed herein, of the United States (December, 1985).

Respondents attempt to minimize the impact of the decree upon non-minorities. The Respondent Vanguards argue that since the Decree created vacancies in excess of the number of minority promotions, "Non-minorities have fared better under affirmative action than they would have fared without it." (Br. Vang. at 19).[5]

Petitioner submits that this statement reflects the Respondent's disregard and/or lack of understanding of the Petitioner Local 93's position. As official bargaining representatives for all Cleveland Firefighters, Petitioner's goal is to have the best, most competent firefighting force possible. The purpose of this goal is to ensure the maximum safety and protection of its individual members as well as the citizens of Cleveland. This concern obviously was not considered when the Respondent City of Cleveland bargained away the rights of the Petitioner's individual members. Local 93 is painfully aware that nobody "fares better" when persons are promoted to positions of leadership in this most dangerous of civilian occupations based on their membership in a class and not upon objective job-related testing and experience.

To illustrate the unfair application of the decree, consider the following. Numerous minorities were hired and allocated seniority out of rank order after 1973, pursuant to the *Headen* decree, and thus were given benefits without showing of individualized harm. This constituted their first and second "leg up" on non-minorities.

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[5]Although Respondents claim that the overall number of promotions increased dramatically under the terms of the decree, and therefore non-minorities benefitted as well as minorities, actual staffing figures do not bear this out. In 1976, the total staffing of the Fire Department was 1,119. Of this number, 293 were officers, or 26% of the total staffing. In 1986, the total staffing is 941, of which 247 are officers, which is still 26% of the total staffing. Thus, the ratio of officers to total staffing has remained unchanged in the past ten years.

Competing for promotion in 1980, and pursuant to promotional exams taken in 1980, and the subsequently challenged decree, minorities were given appointments as lieutenants, out of rank order as a third benefit without a showing of any specific victimization. Pursuant to this promotion, they were also awarded a seniority ranking above their actual scoring and above many non-minority promotees constituting their fourth benefit.

Pursuant to the terms of the decree, some of these individuals were appointed to the rank of captain from the 1983 examination and an additional move up of their seniority. This would have been their fifth and sixth benefit.

The 1985 test would operate to again move several minorities ahead of non-minorities and push forward their seniority ranking, giving them an additional two benefits without any evidence justifying such individualized relief.

Respondents claim that the non-minorities lost little in regards to the terms and conditions of their employment. In actuality, the consent decree deprives non-minorities of substantial benefits, and unfairly trammels their rights and interests. These lost benefits include hiring opportunities, promotional opportunities, and seniority in rank, which they had rightfully earned.

When this is scrutinized in light of the fact that these non-minorities could not be shown to have individually participated in any past discrimination, it's disproportionate impact further highlights that their rights and interests have been repeatedly and illegally trammelled. Coupled with the fact that certain minorities could have received eight different racially discriminatory advantages, or "legs up," without ever showing that they were in fact victims personally of any racially discriminatory practices, procedures, or even an isolated act, it underscores the invidious nature of the prospective equity provision of the within consent decree.

In spite of this, Respondents somehow allege that Petitioner suffered no damage to their seniority rights and have attempted to raise the issue for the first time in this Court. (Cr. City at 22; Br. Yang. at 46). This argument is totally without merit. Seniority and promotions have always been in accordance with the Memorandum of Understanding between the representative Union, Local 93 and the City. That document incorporates a system of promotion pursuant to the Civil Service Rules on an objective basis. The decree in the present case overrides that system and awards promotions not on merit, but upon membership in a class based upon race. This newly-instituted promotional system under the decree clearly alters the promotional procedure under the Memorandum of Understanding between Local 93 and the Cities Civil Service Rules then in effect, copies of which have been lodged with this Court simultaneously with the filing of this brief.

The Memorandum of Understanding also makes clear that when a firefighter is denied promotion pursuant to the decree, his losses are substantial: increased salary, preferences in vacations, holidays, shift selections, transfers, overtime and layoffs.

CONCLUSION

Petitioner, after careful review of the previous decisions of this Court, and Respondents assertions, respectfully urge this Court to render the within decree invalid.

Respectfully submitted,

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APPENDIX

Note—etc.

(p. 69) A. Correct.

Q. How many minorities were there that came on the force with you at that time?

A. Twenty-three.

Q. Twenty-three?

A. Right.

Q. You stated that none of those people prior to November of '81 were eligible to take an exam given for promotion in the Cleveland Fire Department; correct?

A. No. I stated that they weren't given the opportunity to take an exam.

Q. Why were they not given an opportunity?

A. Because the exam that was given in 1975 had been tied up in litigation, and there have been no tests given because of that fact.

Q. So no tests had been given is the reason they did not take an exam?

A. Correct.

Q. So that out of everyone that entered in 1973 along with you, both minorities and non-minorities, none of those people have taken a promotional exam?

A. Correct.

Q. Additionally, you went through Exhibits 14-A through

AMICUS CURIAE

BRIEF

MOTION FILED
NOV 19 [redacted]

Supreme Court, U.S.
FILED
NOV [redacted] 1985

No. 84-1999

In The
Supreme Court of the United States
October Term, 1985

LOCAL NO. 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS,

Petitioners,

v.

CITY OF CLEVELAND,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE, PACIFIC LEGAL FOUNDATION, IN SUPPORT OF PETITIONERS

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No. 84-1999

In The
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LOCAL NO. 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS,

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE, PACIFIC LEGAL FOUNDATION, IN SUPPORT OF PETITIONERS

This motion of Pacific Legal Foundation for leave to file the annexed brief amicus curiae is respectfully made pursuant to Supreme Court Rule No. 36. Consent to the filing of this brief has been granted by counsel for petitioners and for respondent, Vanguards of Cleveland; these consents have been lodged with the Clerk of this Court. Consent has been withheld by counsel for respondent, City of Cleveland.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation, incorporated under the laws of California for the purpose of participating in litigation affecting public policy. Policy of the Foundation is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The Foundation's Board of Trustees has authorized the filing of a brief amicus curiae in this matter.

Pacific Legal Foundation has participated in numerous cases which involved issues similar to that presented in this matter. The Foundation's public policy perspective and litigation experience in support of individual liberties will help provide this Court with additional argument in light of the erroneous holding of the Sixth Circuit Court of Appeals in this matter.

For the foregoing reasons, Pacific Legal Foundation requests that the motion to file the annexed brief amicus curiae be granted.

DATED: November, 1985.

Respectfully submitted,

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No. 84-1999

In The

Supreme Court of the United States

October Term, 1985

LOCAL NO. 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS,
Petitioners,

v.

CITY OF CLEVELAND,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF AMICUS CURIAE, PACIFIC LEGAL FOUNDATION, IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS

The interest of amicus is set forth in the preceding motion for leave to file this brief.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 753 F.2d 479 (6th Cir. 1985).

STATEMENT OF THE CASE

This case presents the issue whether a court may adopt a consent decree in a Title VII case even though the court could not order the relief in the decree had the case gone to trial. Furthermore, this case raises the issue whether Title VII and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution permit a city to promote its employees on the basis of race.

An association of black and Hispanic fire fighters challenged the City of Cleveland's promotion of fire fighters under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, 42 U.S.C. §§ 1981 and 1983, and the Thirteenth and Fourteenth Amendments. After settlement negotiations began, Local No. 93 was granted permission to intervene. The association and city proposed a consent decree which, *inter alia*, required the promotion of a certain number of minority employees, regardless of their rank on a competitive examination and seniority. The fire fighters union, Local No. 93, objected to the decree and appealed the District Court's adoption of it.

The Sixth Circuit Court of Appeals held that the decree was fair and reasonable to the nonpreferred employees. The court further held that this Court's decision in *Firefighters Local Union No. 1784 v. Stotts*, — U.S. —, 81 L. Ed. 2d 483 (1984), was inapplicable on two grounds. First, the present case does not involve an abrogation of employees' seniority as did the injunction in *Stotts*. Second, the employer in the present case has voluntarily agreed to the race-based promotion decree whereas the District Court ordered the unwilling employer in *Stotts* to alter layoff procedures to protect certain races.

SUMMARY OF ARGUMENT

A consent decree should not be permitted in a Title VII case when that decree imposes disabilities upon members of nonpreferred classes that could not be directly ordered by the courts. Title VII prohibits discrimination on the basis of race against nonminorities as well as minorities. *Firefighters v. Stotts*, 81 L. Ed. 2d 483, makes clear that employment preference under Title VII is restricted to actual victims of discrimination, unlike the consent decree order in this case. Even if this Court should find that Title VII does not afford nonminorities equal protection in employment, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution precludes state and local governments from agreeing to grant preference in employment to members of certain racial classes without a narrow tailoring to ensure such benefits are restricted to victims of past discrimination.

ARGUMENT

I

THE DISTRICT COURT'S AUTHORITY TO ADOPT A CONSENT DECREE IS TIED TO THE STATUTE THAT IS SOUGHT TO BE ENFORCED

The Court of Appeals in *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479, declared that a court should adopt a consent decree if the settlement is fair. *Id.* at 484, (citing *Williams v. Vukovich*, 720 F.2d 909, 921 (6th Cir. 1983)). More specifically, a consent decree which creates an affirmative action plan must be fair and reasonable to the nonminorities who may be affected by the plan.

Vanguards, 733 F.2d at 484, (citing *Bratton v. City of Detroit*, 704 F.2d 878, 887 (6th Cir. 1983)), *modified on reh'g*, 712 F.2d 222, *reh. denied*, 104 S. Ct. 703 (1983). Although this Court has not announced a standard to review consent decrees in such cases, the consent decree in the present case fails the standard that was purportedly used. Illegality cannot coexist with fairness.

A consent decree has the features of both a contract and a judicial act. *See United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236 n.10 (1975); *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971). However, a court should not approve a consent decree merely because the parties agreed to it. The fact that a consent decree is a final judicial order limits its possible provisions.

This Court has stated in *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961), that "the District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce." *Id.* at 651, *quoted in Firefighters Local Union No. 1784 v. Stotts*, 81 L. Ed. 2d at 497 n.9. In *System Federation*, this Court reasoned that a court must be able to modify a consent decree when the statute has been amended. 364 U.S. at 651. "The parties have no power to require of the court continuing enforcement of rights the statute no longer gives." *Id.* at 652.

Similarly, parties have no power to require the court to enforce rights the statute never gave. In a case involving the enforcement of rights under Title VII, the consent decree should not go beyond the relief which Title VII provides. A consent decree is a settlement; one would not

expect a party to agree in settlement to provide more relief than the opposing party could ever obtain had the case gone to trial. However, the consent decree in the present case provides relief that a court could not order under Title VII: benefits to those who have not been found to be victims of past discrimination. This Court has clearly held in *Stotts*, 81 L. Ed. 2d at 499-500, that a court cannot order blanket relief to those who are merely members of a racial class. Identifiable victims alone should be made whole. *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

The Court of Appeals here attempted to distinguish *Stotts* by noting that in the present case the employer and minority plaintiffs have agreed to the decree. *Vanguards*, 733 F.2d at 489. Such a distinction is without significant difference. The decree states on its face that it is an order, a judgment, and a decree. As Judge Kennedy noted in dissent, "[t]hat the defendants agreed to entry of the order does not make it any less an order." *Id.* at 492.

A consent decree is different from a purely voluntary agreement. Enforcement of the decree is through contempt proceedings, rather than a breach of contract cause of action. Furthermore, the court has continuing jurisdiction over the decree to modify it in light of the remedies provided by the statute. Since the consent decree is court-ordered relief, the decree should be governed by the rule in *Stotts*. The decree requires promotion of fire fighters who either were not promoted for legitimate reasons or who had never been eligible for promotions. Relief provided to those who were not victims of past discrimination violates both the letter and the spirit of *Stotts*.

The Court of Appeals also attempted to distinguish *Stotts* on the basis that the court there abrogated a seniority system. *Vanguards*, 753 F.2d at 486. In the present case, the "benefit of seniority is . . . maintained by the consent decree." *Id.* However, the decree requires that minority fire fighters who pass the examination must be promoted before nonminorities who would otherwise be promoted on the basis of their seniority and examination scores. The Court of Appeals thus erred in stating that the decree "plainly does not interfere with any seniority rights." *Id.*

Consideration of the consent decree entered into by the employer city and the minority fire fighters should be governed by the policies supporting this Court's decision in *Stotts*. The purpose of Title VII in prohibiting a court from ordering the abrogation of seniority is to protect the interests of their employees with seniority, not the employer. 42 U.S.C. § 2000e-2(h). Similarly, a court may not order relief under Title VII to benefit those who are not victims. 42 U.S.C. § 2000e-5(g). The purpose of that statute is to protect the interests of those employees who must bear the burden of affirmative relief by foregoing otherwise available opportunities. These policies are of little use if a court may adopt through a back door a consent decree which grants judicial approval of an employer's decision to bargain away its employees' interests. A District Court should not order relief, even in a consent decree, which the court could not order had the case gone to trial.

II

A CONSENT DECREE WHICH CREATES RACE PREFERENCE IN A GOVERNMENT OPPORTUNITIES CASE VIOLATES TITLE VII

It is too late in the day to argue that Title VII protects only racial minorities. This Court in *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), declared that "Title VII prohibits racial discrimination against the white petitioners . . . upon the same standards as would be applicable were they Negroes." *Id.* at 280. The legislative history of Title VII is replete with concern about racial discrimination, regardless of any particular race. "Title VII was intended to 'cover white men and white women and all Americans' . . . and create an 'obligation not to discriminate against whites. . . .'" *Id.* (citations omitted).

Legislative history is significant and essential in the application of statutory law. However, the intent of a multipersonality body such as Congress is sometimes difficult to determine. This Court's discussion of the history of Title VII in *McDonald* reminds that the purpose of Title VII was to end racial discrimination of all kinds. In contrast, the interpretation of the legislative history by the majority of this Court in *United Steelworkers v. Weber*, 443 U.S. 193 (1979), is more narrow and incomplete: that the purpose of Title VII is to end discrimination against blacks. The full purpose of the statute in light of its wording and history is the elimination of discrimination against blacks, whites, and indeed people of all races and colors. To enact a statute which is intended to benefit one race over all others is itself racial discrimination. This Court should be hesitant to impute such an intent to Congress.

Title VII clearly forbids an employer: "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-1(a) (2). The City of Cleveland agreed to a consent decree which requires the city to classify its employees on the basis of race. Promotions will be made on the basis of these racial classifications and thereby deprive individuals of promotions who have greater seniority or higher rankings on the competitive examinations than some employees in the preferred class. The provisions of the consent decree thus fall within the proscriptions of Title VII.

The judicial preference for voluntary settlement of Title VII claims announced in *Weber* is wise in most cases. Most out-of-court resolutions of a dispute are acceptable; however, when parties plan to end their dispute by racially discriminating against another group, court action is necessary to protect the interests of all parties. Members of the newly discriminated against class should have the protection of a judicial determination that the beneficiaries of the race preference decree are actual victims of race discrimination. Nonminorities should not bear the burden of advancing the preferred class members unless it is absolutely necessary. To allow otherwise would sanction racial discrimination equally abhorrent to the purposes of Title VII and the Fourteenth Amendment.

III

A CONSENT DECREE WHICH CREATES RACE PREFERENCES IN GOVERNMENT EMPLOYMENT VIOLATES THE FOURTEENTH AMENDMENT EQUAL PROTECTION CLAUSE

Although the Court of Appeals did not address this issue, the effect of the Fourteenth Amendment on the consent decree is an issue of great dimension. The presence of state action, imposed by a municipality and enforced by the court, brings race-based government employment opportunities within the scope of the Fourteenth Amendment. *See Shelley v. Kraemer*, 334 U.S. 1, 14 (1948). City governments cannot prefer one race over another in employment opportunities, regardless of ostensibly laudatory motives. As Justice Powell wrote in *Bakke*, "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Regents of the University of California v. Bakke*, 438 U.S. 265, 291 (1978).

Furthermore, this Court in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), reaffirmed the principle that "[a] program that employs racial or ethnic criteria, even in a remedial context, calls for close examination." *Id.* at 472 (opinion of the Chief Justice). "[T]here is a measure of inequity in forcing innocent persons . . . to bear the burden of redressing grievances not of their making." *Bakke*, 438 U.S. at 298. This inequity should not be imposed by a governmental employer without the safeguards of the Fourteenth Amendment.

First, in order to justify race-conscious remedies, there must be a finding of past racial discrimination. Justice Powell stated that "[w]e have never approved a classification that aids persons perceived as members of relatively

victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations." *Id.* at 307. No competent body has made such a finding in the present case. Although out-of-court settlements may be encouraged in most situations, the Fourteenth Amendment requires judicial determinations before race-conscious remedies may be implemented.

Second, there has been no finding that the race preference decree provides benefits only to actual victims of discrimination. *See Bakke*, 438 U.S. at 301. Unequal protection of laws can be justified only if necessary. There is no necessity to provide race-based employment opportunities to a class only some members of which have been disadvantaged by discrimination. Only actual victims should be made whole. *Stotts*, 81 L. Ed. 2d at 499-500; *Fullilove*, 448 U.S. at 482. The Fourteenth Amendment limits government treatment of people differently *because of their race*. If the decree made whole only victims, then employees would be preferred because of their victim status, and not their membership in a preferred race. Since the decree in the present case prefers nonvictimized employees, the decree is truly a race preference, violative of the Fourteenth Amendment.

Third, in addition to the remedial and actual victims restrictions, the race-based promotion decree must be "narrowly tailored to the achievement of [the] goal" of remedying present effects of past discrimination. *Fullilove*, 448 U.S. at 480 (opinion of Chief Justice Burger). The decree provides for one-half the promotions to certain government jobs to go to members of certain race. The

decree injures the interests in seniority and rank on a competitive examination of members of nonpreferred races. The Court's authority may be broad and remedies numerous, but "[w]hen they touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear . . . is precisely tailored to serve a compelling governmental interest. The Constitution guarantees that right to every person regardless of his background." *Bakke*, 438 U.S. at 299. A more narrowly tailored entry level affirmative action program already exists which will increase minority representation throughout the City of Cleveland's fire department. *Vanguards*, 753 F.2d at 485. Such a remedy adequately addresses the perceived problem of proportional underrepresentation without unnecessarily trammeling the rights of current fire fighters.

The source of authority for the race-based decree, Congress in *Fullilove* and the City of Cleveland in the present case, is not insignificant. In *Fullilove* a fragmented Court upheld a race-based program under various broad powers of Congress: the Spending Power, the Commerce Clause, and Section 5 of the Fourteenth Amendment. *Fullilove*, 448 U.S. at 473-75.

> "Here, we deal . . . not with the limited remedial powers of federal court . . . but with the broad remedial powers of Congress. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress." *Fullilove*, 448 U.S. at 483.

The City of Cleveland has only its limited police powers to impose the racial quotas in the present case. *Texas v. Reich*, 239 U.S. 33, 41 (1915), specifically rejected the

adequacy of the police power as authority to enact quotas based on national origin and, by analogy, race. This Court also noted that the program in *Fullilove* "press[ed] the outer limits of congressional authority." *Id.* at 490 (opinion of Chief Justice Burger). If Congress pressed the outer limits in *Fullilove* with a 10% racial preference, then the City of Cleveland has shattered the constitutional border with a 50% race preference.

The consent decree in this case is inconsistent with the essence of the notion of equal protection. "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal." *Bakke*, 438 U.S. at 289-90. In an attempt to ward off charges of racial discrimination, the City of Cleveland has agreed to a scheme where truly some are more equal than others. As one form of oppression was replaced with another form in George Orwell's *Animal Farm*, the City of Cleveland has replaced an alleged form of racial discrimination with an official policy institutionalizing racial discrimination. The Equal Protection Clause of the Fourteenth Amendment does not tolerate solving one social problem by replacing it with another.

CONCLUSION

The answer to a legal question often turns on the choice of words in how the question is phrased. If the question is whether an employer may voluntarily use an affirmative action program to eliminate the present effects of past

discrimination, an affirmative answer may appear harmless at first glance. However, when the issue is whether a government employer may divide its employees into racial groups and make promotions on the basis of race rather than on seniority or merit in order to thwart an allegation of discrimination, a different answer is required. The Equal Protection Clause demands equal treatment by government agencies. Inequal treatment can only be justified if the safeguards of specific judicial findings are present. None of those protections were used in the present case.

Because the District Court adopted a decree ordering racial preferences repugnant to Title VII and the Fourteenth Amendment, amicus Pacific Legal Foundation urges that the decision of the Sixth Circuit be reversed.

DATED: November, 1985.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
NOV 21 1985

No. 84-1960

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, C.L.C.
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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF AMICUS CURIAE THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a District Court violates Title VII by requiring racial preferences in governmental job promotions to non-victims of racial discrimination to the detriment of innocent employees.

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INTERESTS OF AMICUS CURIAE

The Washington Legal Foundation ("WLF") is a national nonprofit public interest law center with more than 200,000 members and supporters throughout the United States. WLF engages in litigation and admin-

istrative proceedings in matters affecting national legal policy and the basic rights of ordinary, law-abiding citizens.

WLF has a record of longstanding interest and involvement regarding the controversial issues of affirmative action, racial quotas, and reverse discrimination. Firmly committed to the great principle that our Constitution is color-blind, WLF has consistently opposed the self-contradictory notion that affirmative action plans, supposedly designed to assure *equal* opportunity, may legally justify intentional discrimination against non-minorities.

In pursuit of its view that the equal protection clause and the civil rights laws protect all citizens against discrimination, WLF has filed briefs *amicus curiae* in many of the leading Supreme Court cases in this area, *e.g.*, *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984); *Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP, et al.*, No. 82-185 (1984); *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

In the instant case, the Washington Legal Foundation seeks to advance the interests of its members and the public by urging this Court to reverse the decision of the United States Court of Appeals for the Sixth Circuit. By affirming the district court's adoption of a consent decree, the Sixth Circuit has erroneously sanctioned relief measures which exceeded the proper scope of a federal court's remedial powers. Such "relief" measures included the interference with established seniority rights and the requirement that preferential treatment be given to minority employees in promotions based solely on their race, even though these individuals were not shown to be victims of past discrimination. The district court clearly exceeded its remedial authority under Title VII. Because it affirmed these measures outside the authority of Title VII, the Sixth Circuit must be reversed.

WLF believes that the consent decree in issue represents a dangerous and invidious form of reverse discrimination. Accordingly, we submit this brief *amicus curiae* in order to bring WLF's public interest perspective on this important issue to the Court's attention.

All parties have consented to the filing of this *amicus curiae* brief in papers which have been filed with the Clerk of this Court.

STATEMENT OF THE CASE

In the interests of judicial economy, *amicus* adopts by reference the Statement of the Case contained in the Petition for Certiorari at 2-4.

SUMMARY OF ARGUMENT

The Sixth Circuit Court of Appeals erred when it concluded that this Court's decision in *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984) is inapplicable to this case. Seniority rights were damaged in this case just as they were in *Stotts*. That this case turns on a consent decree rather than an injunction does not remove it from the reach of *Stotts* since it is not a voluntary plan bargained among the parties and is constrained by the policies of Title VII. *United Steelworkers v. Weber*, 443 U.S 193 (1979), in no way limits *Stotts* since *Weber* is factually distinguishable and *Stotts* enunciated basic and overriding principles unaffected by an older and narrower decision.

The district court clearly exceeded its remedial authority under Title VII. The court's approval of the consent decree in issue is a judicial act and thus is governed by principles applicable to court-ordered relief. Those principles dictate that a court may not fashion remedies that are outside statutory limitations or conflict with statutory objectives. Title VII in language and purpose unmistakably confines remedial measures to

those who are actual identified victims of discrimination. In light of Title VII, the district court impermissibly imposed quota relief to the detriment of innocent employees.

Finally, the consent decree is contrary to the public interest. The use of quotas in promotions is morally repugnant because it abandons the principles of equal opportunity and nondiscrimination in this country. Moreover, the decree is ineffective in promoting the policy goals of Title VII because, *inter alia*, it fails to achieve economic improvements for minorities, degrades the performances of minorities, and hurts other minorities and disadvantaged whites.

ARGUMENT

I. THE COURT OF APPEALS ERRONEOUSLY CONCLUDED THAT THIS COURT'S DECISION IN *FIREFIGHTERS LOCAL UNION NO. 1784 v. STOTTS* HAS NO EFFECT ON THIS CASE.

This Court decided in *Firefighters Union No. 1784 v. Stotts*, —— U.S. ——, 104 S. Ct. 2576 (1984) that in ordering relief for violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, a court is limited to making whole or granting relief only to individuals who have demonstrated that they have been actual victims of past discrimination. In *Stotts*, the district court modified a Title VII consent decree despite the objection of the employer, the City of Memphis. The modification prohibited the city from following its seniority policy "insofar as it will decrease the percentage of black lieutenants, drivers, inspectors and privates that are presently employed." *Stotts*, 104 S. Ct. at 2582. Thus, some "non-minority employees with more seniority than minority employees were laid off or demoted in rank."

Guided by *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976) and *Teamsters v. United States*, 431 U.S. 324 (1977), this Court reversed and held that it was improper under Section 706(g) of Title VII for the Court to award protection against lay-offs because of "mere membership in the disadvantaged class." *Id.* at 2588. Moreover, this Court found in light of *Teamsters* that the quota relief imposed by the lower courts "could not have been ordered had the case gone to trial and the plaintiffs proved that a pattern or practice of discrimination existed." *Id.* The Court found this conclusion reinforced by the clear and unambiguous legislative history of Section 706(g).

The fundamental and overriding principle enunciated in *Stotts*—relief can only be awarded to actual discrimination victims—is unmistakable. Nevertheless, numerous lower courts which examined the meaning of *Stotts* have unduly narrowed or even scornfully disregarded the ruling of this Court. *See Devereaux v. Geary*, No. 84-2004 (1st Cir. June 24, 1985); *Turner v. Orr*, 759 F.2d 817, 823-826 (11th Cir. 1985); *EEOC v. Local 638*, 753 F.2d 1172, 1186 (2d Cir. 1985), petition for cert. pending, No. 84-1656; *Diaz v. AT&T*, 752 F.2d 1356, 1360 n.5 (9th Cir. 1985); *Van Aken v. Young*, 750 F.2d 43, 45 (6th Cir. 1984); *Wygant v. Jackson Board of Education*, 746 F.2d 1152, 1157-1158 (6th Cir. 1984), *cert. granted*, No. 84-1340 (Apr. 15, 1984); *Kromnick v. School District*, 739 F.2d 894, 911 (3rd Cir. 1984), *cert. denied*, No. 84-304 (Oct. 15, 1984).

In adopting a similarly crabbed reading of *Stotts*, one Court of Appeals admitted: "[T]his is a difficult and sensitive area in which we and the other Circuit Courts could be mistaken in our reading of current precedent." *Devereaux*, *supra*, slip. op. at 18.

The Sixth Circuit Court of Appeals has proved no exception to this unfortunate trend and grounded its decision in this case in reasons that have been typically used to emasculate the ruling in *Stotts*. Essentially, the Sixth Circuit majority decided that *Stotts* is not applica-

ble in this case for three reasons: (1) the consent decree maintained the existing seniority system rather than abrogated it; (2) a consent decree and not an injunction is involved; (3) *Stotts'* application to this case is limited by *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). None of these reasons remotely justifies or explains the Sixth Circuit's disregard of the basic legal principles affirmed in *Stotts*.

A. The Holding Of The Sixth Circuit That *Stotts* Is Inapplicable Because Seniority Rights Were Not Abrogated Is Erroneous.

The Sixth Circuit pointed out that the consent decree here assured the integrity of the existing seniority system and thus was factually distinguishable from *Stotts*, where the district court's action abrogated the seniority system. 753 F.2d at 486. Although the consent decree does not totally invalidate the seniority system, it does significantly interfere with seniority rights as the injunction did in *Stotts*. Prior to the decree in the instant case, firefighters were promoted on the basis of combined factors that included seniority and examination scores. Under the decree, however, minority firefighters who pass the examination must be promoted ahead of non-minority firefighters who would otherwise have been promoted because of their seniority and examination scores. As Judge Kennedy accurately noted in her dissent below, "[t]he consent decree in this case in effect gives minority firefighters superseniority over all non-minority firefighters for promotion purposes." Indeed, the decree reminds one of the famous line in George Orwell's *Animal Farm*: "All animals are equal but some are more equal than others." The decree is nothing less than a blatant attempt at invidious racial quotas in promotions.

Although seniority will continue to be a criterion in promotions, this factor hardly survives intact under the decree. The seniority rights of non-minority firefighters are discounted in an attempt to achieve racial balance in promotions. The fact cannot be glossed over that the promotion opportunities of innocent non-minority firefighters are diminished. It was disingenuous for the Sixth Circuit majority to portray this situation as inapposite to *Stotts* simply because a seniority system was not totally discarded. Seniority rights *have* been seriously affected in this case as they were in *Stotts*.

There is simply no principled way to distinguish between diminished seniority rights in layoffs and diminished seniority rights in promotions. In either case, serious economic consequences are borne by non-minority firefighters. The fact that the loss of a job is a more severe result than a loss of a promotion resulting from racial preferences does not justify this consent decree. Promotions are obviously important to careers. Otherwise, racial preferences would not be pushed in this area. Further, *Stotts* in no way suggests that the level of negative impact on innocent non-minorities determines the legality of a racial preference.

Finally, this factual distinction based on the impact on the seniority system is faulty because it takes an unduly narrow view of *Stotts*. The rationale of this Court in *Stotts* clearly is not limited only to factual situations involving layoff plans. Indeed, the Court relied heavily on the broad policy behind Title VII. Contrary to the views of the Sixth Circuit majority and other lower federal courts, *Stotts* does not represent the mere adjudication of a narrow issue but a seminal decision on one of the most pressing social problems in this country: the proper use of remedies for past discrimination. This Court should reaffirm *Stotts* in the strongest and broadest fashion.

B. The Nature Of The Consent Decree In This Case Provides No Grounds For Distinguishing It From *Stotts*.

The Sixth Circuit also tried to distinguish *Stotts* from this case because a consent decree is involved here. The Sixth Circuit noted that *Stotts* involved the imposition of a layoff plan based on racial preferences over the objection of the City of Memphis. In this case, the City of Cleveland agreed to the promotion plan in question. The Sixth Circuit then quoted a passage from the *Stotts* opinion indicating that this Court itself recognized such a distinction.[1]

The claimed distinction fails for several reasons. First, the fact that the district court's order is labeled a "consent" decree does not make it voluntary in the most crucial respects. Those parties who are necessarily disadvantaged (the union and the non-minority employees) are the parties who did not consent. In fact, the agreement by the employer to alter the collective bargaining agreement without the union's consent is an act that would generally constitute an unfair labor practice under federal labor law. *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 771 (1983). The rights of non-consenting and innocent non-minority employees are especially endangered in the context of governmental employers, where preferences are adopted primarily because of the political power of groups advocating such preferences. *See, e.g.*,

[1] The quoted passage was as follows:

> [T]he Court of Appeals was of the view that the District Court ordered no more than that which the City unilaterally could have done by way of adopting an affirmative action program. Whether the City, a public employer, could have taken this course without violating the law is an issue we need not decide. The fact is that in this case the City took no such action and that the modification of the decree was imposed over its objection.

Stotts at 2590 (footnote omitted).

Dougherty v. Barry, 607 F. Supp. 1271 (D.D.C. 1985), *appeal pending*, No. 85-5715, 85-5716 (D.C. Cir. 1985).

Second, the consent decree cannot override Title VII and the meaning of *Stotts* even if it is voluntary. The Vanguards and the City have in effect tried an "end run" around the principle of no relief for non-victims of discrimination at the expense of innocent employees. If the Court carves out an exception to the *Stotts* principle, it will swallow the rule and reduce *Stotts* to a mere footnote in the caselaw of civil rights.

Finally, the Sixth Circuit completely misinterpreted *Stotts* as support for the consent decree distinction. It attempted through mental gymnastics to infer that this Court implicitly recognized an exception simply because the factual situation here was not decided in *Stotts*. The quoted passage in no way hints that the Court would recognize such an exception. Indeed, in a desperate attempt to find support for its view, the Sixth Circuit ignored an important point stressed in *Stotts*: a Court may not impose on the parties "something that could not have been ordered had the case gone to trial and the plaintiffs proved that a pattern or practice of discrimination existed." *Stotts* at 2588.

C. *Weber* Does Not Preclude The Application Of The *Stotts* Principles In This Case.

The Sixth Circuit insisted that *Stotts* is sharply limited by this Court's decision in *United Steelworkers v. Weber*, *supra*. 752 F.2d at 487. The holding of *Weber* was characterized by the Sixth Circuit as follows: "[A]n employer does not violate Title VII by voluntarily adopting a reasonable race-conscious plan to increase minority employment, even when the plan has the effect of overriding the seniority rights of non-minorities." *Id.* From this view of *Weber*, the Sixth Circuit concluded that *Weber* "precludes any notion that Title VII absolutely forbids voluntary action by an employer to the detriment of the

seniority rights of non-minority workers." *Id.* The Sixth Circuit reasoned that if this Court had intended to invalidate voluntary employer plans it would have expressly overruled *Weber*.

The Sixth Circuit profoundly misconstrued the relationship between the narrow *Weber* ruling and the broad and binding principles confirmed in *Stotts*. In *Weber*, this Court upheld a racial preference measure but was careful to insist that such a measure can only be sustained under the most narrowly-defined and carefully-ordered circumstances. Specifically, it was held that certain racial preference measures in the private employment context could be upheld only where they were accurately tailored to remedy specific findings of past discrimination; would not unduly trammel the interests and opportunities of white employees or create an absolute ban to their advancement; and were temporary in duration. 443 U.S. at 208. The Court further emphasized the "narrowness" of its inquiry and its ruling. 443 U.S. at 200.

However, *Weber* did not hold that such racially preferential measures could be upheld under the same standards when undertaken by a government employer. The respondents cannot even justify their actions under the standards for private employers set forth in *Weber*.[9] But what is permitted for a private employer under *Weber* is not necessarily permitted to a government employer like the City of Cleveland under the stricter constitutional standards governing state action. *See Regents of the Univ. of California* v. *Bakke*, 438 U.S. 265 (1978). Moreover, racial quotas effectuated by a government employer over the objection of the employees' union present an especially serious threat to a non-discriminatory work environment. Indeed, the objection to the plan by the union

[9] For example, the measures undertaken in the consent decree unduly trammel the interests and opportunities of promotion for non-minority employees.

here makes this case clearly distinguishable from *Weber*, where the employer and the union bargained together for the adoption of racially preferential measures.

Not only is the Sixth Circuit's reliance on *Weber* misplaced, but its conclusion on the impact of *Weber* on *Stotts* is perverse. *Weber* is to be read in light of the *Stotts* decision that followed it, not vice versa. To the extent that *Weber* conflicts with the broad basic principles of *Stotts*, this Court *subsilentio* overruled *Weber*. For example, the decision in *Weber* was based upon a characterization of the policy of Title VII at least partially denied in *Stotts*. According to *Weber*, a privately adopted remedial preference complies with Title VII's policy of increasing minority employment—a form of compliance compelled by versions of disparate impact theory which impose stringent justification requirements on employers. But in *Stotts*, this Court held that a judicially imposed racial preference is inconsistent with Title VII's policy of providing make whole relief only to actual victims of unlawful discrimination—a policy at odds with a functional definition of discrimination in *Weber* that treats as unlawful an employer's failure to allocate employment opportunities proportionally among race and gender groups.

II. THE DISTRICT COURT EXCEEDED ITS REMEDIAL AUTHORITY UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.

The underlying point of the Sixth Circuit majority's analysis is that a consent decree should not be governed by the principles applicable to court-ordered relief and thus may even prescribe relief beyond that authorized by the statute. The court below misconceived the nature of a consent decree and thus erroneously permitted remedies outside the authority granted by Title VII.

A. A Consent Decree Is A Judicial Act.

A consent decree is a judicial act and should be treated as such. First, by its very terms it is the equivalent of a judgment. Anderson, *The Approval and Interpretation of Consent Decrees in Civil Rights Class Action Litigation*, 1983 U. Ill. L.Rev. 579, 585. Since the merger of law and equity, the technical differences between a "decree in equity" and a "judgment at law" have been erased and the terms are used interchangeably.[5]

Second, consent decrees providing for structural change, unlike money settlements, are a form of equitable relief. *Id.* Money settlements normally involve one transaction or a series of similar transactions. In contrast, structural reform requires changes over time in the operations of institutions such as prisons, schools, and workplaces. Thus, this Court in *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981), held that a district court's refusal in a Title VII action to approve a proposed settlement providing for hiring and seniority preferences for black employees was immediately appealable under 28 U.S.C. § 1292 (a)(1) as an interlocutory order refusing an injunction. The Court reasoned that the proposed settlement was a prospective injunction. Moreover, like any injunction, a consent decree can also be modified by the court, even over the objections of a party, in order to effectuate the basic purpose of the decree.

Third, as Judge Kennedy in her dissent below noted, the consent decree in this case is clearly an "order of the court." 573 F.2d at 492. The Sixth Circuit itself observed in *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983) that "a consent decree, however, is also a final judicial order."

Fourth, unlike a contract or a private out-of-court settlement, a consent decree can be enforced by citation for

[5] Fed. R. Civ. P. 54(a) provides: "'Judgment' as used in these rules includes a decree and any order from which an appeal lies."

contempt of court. *See, e.g., EEOC v. Local Union No. 88*, 28 Fair Empl. Prac. Cas. (BNA) 1567, 1575 (N.D. Cal. 1981) (contempt citation). This point was recently reinforced by the Ninth Circuit Court of Appeals in *SEC v. Randolph*, 736 F.2d 525, 528 (1984): "A consent decree is a judgment, has the force of *res judicata*, and it may be enforced by judicial sanctions, including, as in this case, citations for contempt."

Finally, the consent decree in this case involves legal consequences far beyond a mere private contract. For example, the government employer agreed to radically alter the collective bargaining agreement without the union's consent, an act that would generally constitute an unfair labor practice under federal labor law. Moreover, Section 18 of the consent decree permits the decree to override potential conflicts with the constitution, statutes, and regulations of the State of Ohio. Pet. App. A37. Such preemptive effect could only come from a judgment whose authority reposes in federal law.

B. A Consent Decree May Not Exceed The Bounds Of Judicial Authority.

Stotts directly addressed the question of whether a District Court may adopt remedies in a consent decree purporting to redress a Title VII violation that would not have been granted had the matter gone to trial. In footnote 9, this Court declared:

> [T]he District Court's authority to impose a modification of a decree is not wholly dependent on the decree. "[T]he District's [sic] Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce," not from the parties' consent to the decree. *System Federation No. 91 v. Wright*, 364 U.S. 642, 651 (1961). 104 S. Ct. at 2587.

The reliance of *Stotts* on *System Federation* amply demonstrates this Court's adherence to the basic principle

that a consent decree may not award relief that exceeds statutory limitations and is "in conflict with statutory objectives." 364 U.S. at 651.

Moreover, the holding of *Stotts* that a modification of a decree is limited by the statutes enforced rests on the necessary premise that a consent decree is also so limited. Indeed, in *Stotts*, the three dissenting justices and one concurring justice interpreted the majority opinion as saying that a consent decree cannot provide relief that would be unavailable after trial. *See Stotts*, 104 S. Ct. at 2605, n.9 (Blackmun, J., dissenting). ("The Court's analysis seems to be premised on the view that a consent decree cannot provide relief that could not be obtained at trial."); *Id.* at 2594 n.3 (Stevens, J., concurring). ("The Court seems to suggest that a consent decree cannot authorize anything that would not constitute permissible relief under Title VII.") Justice O'Connor in her concurrence expressly agreed with the Court's application of Title VII to limit proper modifications of the consent decree: "Unlike the dissenters and Justice Stevens, I find persuasive the Court's reasons for holding Title VII relevant to analysis of the modification issue [cites omitted], and the Court's application of Title VII's provisions to the facts of the present controversy." *Id.* at 2593 n.2. Thus, the fact that five justices joined the opinion of the Court, well aware of this interpretation of their opinion, clearly shows that this Court meant what it said.

C. The District Court's Adoption Of The Consent Decree Exceeded Statutory Limitations And Is In Conflict With Statutory Objectives.

The consent decree in this case derives its force from Section 706(g) of Title VII which limits the remedies that a court may order upon a finding of a violation of Section 703(a).

Section 706(g) provides in pertinent part:

> No order of the court shall require . . . promotion of an individual as an employee, . . . for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of § 704(a) of this title.

42 U.S.C. § 2000e-5(g).

The language of Section 706(g) could not be any clearer. It plainly bars courts from issuing remedial orders that run in favor of individuals who may be members of a minority group but who have never themselves suffered employment discrimination by the actions of their employer. The consent decree is precisely the type of overinclusive quota remedy barred by the plain language of Section 706(g).

Moreover, the consent decree conflicts with the statutory objectives of the legislative architects of Title VII, who indicated that race-conscious remedies are not permitted. During the consideration of Title VII Senator Hubert Humphrey explained the limits on a court's remedial powers as follows:

> Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the commission or to any court to require hiring, firing or promotion of employees in order to meet a racial "quota" or to achieve a certain racial balance.
>
> That bugaboo has been brought up a dozen times; but is nonexistent.

110 Cong. Rec. 6549 (remarks of Sen. Humphrey).

The statements of Senators Clark and Case likewise made clear that a court was not to use Title VII as a vehicle to impose quotas. "No court order can require hiring, reinstatement, admission to membership, or payment of backpay for anyone who was not discriminated against in violation of this title. *Id.* at 7214. Finally, this Court noted in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 764 (1976) that the 1972 amendments to Title VII evidence "emphatic confirmation that federal

courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible *the victims of racial discrimination.*" (Emphasis added).

III. THE CONSENT DECREE IS CONTRARY TO THE PUBLIC INTEREST.

Not only may this Court examine a consent decree to see if it is consistent with its statutory authority, but it may inquire into the merits of the decree if the public interest might be affected. *See, e.g., United States v. Radio Corporation of America*, 46 F. Supp. 654 (D. Del. 1942), *appeal dismissed*, 318 U.S. 796 (1943). Amicus argues that the imposition of racial quotas by a consent decree such as the one at issue would have an unfavorable impact on the public interest for several reasons. Each of these reasons are discussed in the sections that follow.

A. Race-Conscious Remedies Are Morally Repugnant.

The promotion plan is morally offensive because it represents the idea that Jim Crow represented; namely, that race makes a difference in the assessment of character or qualification. Civil rights proponents and commentators have consistently abhorred judgmental decisions that take race into account. As Dr. Martin Luther King, Jr. stated,

> I have a dream that one day this nation will rise up and live out the true meaning of its creed: "We hold these truths to be self-evident, that all men are created equal" . . . I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.

M. King, Jr., "I Have a Dream," quoted in J. Franklin and I. Starr, eds., *The Negro in Twentieth Century America* 164-66 (1967).

President Kennedy remarked about his upcoming civil rights bill that he would ask Congress to act "to make a

commitment it has not fully made in this century to *the proposition that race has no place in American life or law*," (emphasis added). *Public Papers of the President of the United States, John F. Kennedy*, vol. 3 at 218.

Moreover, Charles Murray, Senior Research Fellow at the Manhattan Institute for Policy Research has criticized the racism perpetuated by race-conscious remedies:

> [H]ardly anyone, no matter how strictly noninterventionist, can watch with complete equanimity when a black child is deprived of a chance to develop his full potential for reasons that may be directly traced to a heritage of exploitation by whites. Neither can anyone, no matter how devoted to affirmative action, watch with complete equanimity when a white job applicant is turned down for a job in favor of a black who is less qualified. Something about it is fundamentally unfair—un-American—no matter how admirable the ultimate goal.

C. Murray, *Losing Ground*, 221 (1984).

As Murray cogently points out, "we may argue about the appropriate limits of government intervention in trying to enforce the ideal, but at least it should be possible to identify the ideal: Race is not a morally admissable reason for treating one person differently from another. Period." *Id.* at 223. Professor Alexander Bickel also eloquently stated the human costs of immoral racial quotas:

> [A] racial quota denigrates the human dignity and individuality of all to whom it is applied; it is invidious in principal as well as in practice. Moreover, it can as easily be turned against those it purports to help. The history of the racial quota is a history of subjugation, not beneficence. Its evil lies not in its name but in its effects; a quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make

race irrelevant. A. Bickel, *The Morality of Consent* 133 (1975).

Treating people as categories is offensive not only to morality but also to sociology. "American ethnic groups differ in . . . many demographic, geographic, and other respects . . . For example, American ethnic groups differ substantially in median age—by more than a decade, in some cases." Sowell, *Ethnicity in a Changing America*, 107 Daedalus 213 (Winter 1979). Because of the differences among groups, "the very concept of ethnic minorities is misleading . . . and attempts to generalize about minority problems, or to compare one ethnic group to some national average, are still more misleading." *Id.* at 232.

Not only do ethnic groups differ from each other, but there are significant differences within each group. Black Americans are usually considered as a more or less homogenous group. "But the history of black Americans is really the history of three distinct groups, whose descendants have very different incomes and occupations, and even fertility rates in the 20th century." Sowell, *Ethnicity & Three Black Histories*, 3 Wilson Quarterly 96 (Winter 1979).

B. Affirmative Action Is Ineffective As Social Policy.

Not only does affirmative action exacerbate social division, but it also fails to achieve the leveling and redistributionist effects that are the real goal of its proponents. Economic studies show that affirmative action has had little effect on differences between black and white income levels, and that the difference is smallest in industries least affected by preferential policies. Sowell, *Weber and Bakke and the Presuppositions of 'Affirmative Action,'* 26 Wayne L.Rev. 1313, 1326 (1980); Rabkin, *The Stroke of a Pen*, 5 Regulation 16 (1981).

Affirmative action is further counterproductive insofar as the hiring and promotion of underqualified minority

workers which it entails reduces efficiency and removes incentives for them to learn new skills. R. Butler and J. Heckman, The Government's Impact on the Labor Market Status of Black Americans: A Critical Review, in *Equal Rights and Industrial Relations* 248-67 (1977). The Court should not be deluded by the Sixth Circuit's suggestion that "the plan does not require the hiring of unqualified minority firefighters." Indeed, the plan creates a new subclass of "underqualified" workers and degrades the achievement of minority workers. Judge Scalia of the D.C. Circuit Court of Appeals analyzed this problem as follows:

> There is a whole range of ability—from unqualified, through minimally qualified, qualified, well-qualified, to outstanding. If I can't get Leontyne Price to sing a concert I have scheduled, I may have to settle for Erma Glatt. La Glatt has a pretty good voice, but not as good as Price. Is she unqualified? Not really —she has sung other concerts with modest success. But she is just not as good as Price. Any system that coerces me to hire her in preference to Price, because of her race, degrades the quality of my product and discriminates on racial grounds against Price. And it is no answer to either of these charges that Glatt is "qualified." To seek to assuage either the employer's demand for quality or the disfavored applicant's demand for equal treatment by saying there is no need to hire any unqualified individuals is a sort of intellectual shell game, which diverts attention from the major issue by firmly responding to a minor one.

Scalia, *Commentary: The Disease as Cure*, (1979) Wash. U.L.Q. 147-149.

By imposing quotas in promotions, the consent decree degrades minority achievement by assuming that minorities can only be promoted on the basis of race rather than on merit. Such a racial preference may undermine, rather than foster, minority role models. *See Fullilove v.*

Klutznick, 448 U.S. 448 at 547 (1980) (Stevens, J., dissenting); *id.* at 531 (Stewart, J., dissenting); *United Jewish Organizations v. Carey*, 430 U.S. 144, 173-174 (1977) (Brennan, J., concurring in part); *Regents of the University of California v. Bakke*, 438 U.S. at 298 (opinion of Powell, J.); *DeFunis v. Odegaard*, 416 U.S. 312, at 343 (1974), (Douglas J., dissenting); Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 Sup. Ct. L.Rev. 1, 17 & n.35. As Professor Thomas Sowell wrote in *Black Education, Myths and Tragedies* 292 (1972):

> What all the arguments and campaigns for quotas are really saying, loud and clear, is that black people just don't have it, and that they will have to be given something in order to have something. The devastating impact of this message on black people —particularly black young people—will outweigh any few extra jobs that may result from this strategy.

Counting by race is not the only means for getting minorities into the mainstream. Indeed, the facts clearly show this.[8] Studies indicate that once the historic barriers of racial discrimination to achievement for minorities were removed, minorities were able on their own to make very substantial achievements, educationally and economically.[9]

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[8] "Blacks achieved the economic advances of the 1940s once the overt forms of discrimination were outlawed, and the only additional effect of quotas was to undermine the legitimacy of black achievements by making them look like gifts from the Government." Sowell, *A Black "Conservative" Dissents*, New York Times Magazine, August 8, 1976 at 15.

[9] "A newly released RAND study . . . concludes that very little credit should be given to government affirmative action programs for any narrowing of the income gap between white and black workers." Sowell, *Are Quotas Good for Blacks*, 65 Commentary 39, at 41-42 (June 1978).

The affirmative action provisions in the consent decree also have a practical problem in the inherent difficulties of racial definition. For example, Section 2 of the decree refers to "Hispanic" as "all persons of Mexican, Puerto Rican, Cuban, Central or South American, or of the Spanish culture or origin, regardless of race." What of the employee with only one Hispanic grandparent? How much Hispanic blood will suffice for special treatment? The problem is hardly marginal as there are always those who will use deception to obtain a government benefit.[8] The consent decree thus draws the government into the "dirty business of racial labeling, recalling Homer Plessy's expulsion from the white railroad car for being one-eighth black." J. Wilkinson III, *From Brown to Bakke* 292 (1979).

When a consent decree is approved on behalf of one minority group, possible indirect effects on other minority groups get short shrift. A consent decree may diminish opportunities for other minority groups because the employer will now give first priority to hiring or promoting the beneficiaries of the decree. Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and The Fairness of Negotiated Institutional Reform*, 1984 Duke L.J. 887, 929, n.203. For example, the problem has arisen when a decree gives women retroactive seniority over blacks who are subjects of a lawsuit. *See, e.g., EEOC v. McCall Printing Corp.*, 24 Fair Empl. Prac. Cas. (BNA) 437, 441 (6th Cir. 1980) (discrimination suit by women after blacks had negotiated an agreement granting them retroactive seniority rights). The existence of the consent decree does not preclude a different group from later suing the employer for dis-

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[8] In San Francisco, 33 police officers calling themselves American Indians were summoned before the Equal Opportunity Commission and asked to prove their claim. All 33 were reclassified as white. *Disadvantaged Groups, Individual Rights*, New Republic Oct. 15, 1977 at 6.

crimination. *See Worley v. Western Electric Co.*, 28 Empl. Prac. Dec. (CCH) ¶ 32, 417 (N.D. Ga. 1981) ('plaintiffs could have intervened in earlier action resulting in consent decree, but failure to do so did not defeat their right to bring independent action for sex discrimination').

The promotion plan also discriminates against those whites least able to shoulder the burden. The whites displaced by the promotions plan have mainly working class backgrounds. If promotions that count by race are viewed as a way to "repay" a historic debt to blacks and other minority groups, then not only does "repaying" that debt deny moral equality to those receiving the payment, but the class of those shouldering the burden of "repayment" is made up mainly of the offspring of working class whites. As Professor Van Alstyne noted in the *Bakke* case, those more affluent and more able to "repay" the debt pay nothing. *See* Van Alystyne, *A Preliminary Report on the Bakke Case*, 64 AAUP Bulletin 295, 296 (December 1978).

Finally, the promotions plans does not even honor the principle of compensation that such a procedure will help those who have been hurt, that it will give to those from whom much has been taken. The program is wrong because it helps some individuals who have not suffered while it fails to help others who have.

CONCLUSION

The Court should reverse the Sixth Circuit majority and reaffirm in the strongest fashion the principle of moral equality. In so doing, the Court would do well in following the suggestion of Professor William Van Alstyne:

> [O]ne gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment never to tolerate in one's own life—or in the life or practices of one's government—the differential treatment of other human beings by race. Indeed, that is the great lesson for government itself to teach: in all we do in life, whatever we do in life, to treat any person less well than another or to favor any more than another for being black or white or brown or red, is wrong. Let that be our fundamental law and we shall have a Constitution universally worth expounding.

Van Alystyne, *Rites of Passage: Race, the Supreme Court and the Constitution*, 46 U. Chi. L.Rev. 775, 809-810 (1979).

For the foregoing reasons, the Washington Legal Foundation submits that the decisions of the lower courts must be reversed.

Respectfully submitted,

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November 21, 1985

AMICUS CURIAE

BRIEF

FILED
NOV 26 1985

No. 84-1999

IN THE

Supreme Court of the United States

October Term, 1985

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, C.L.C.,

Petitioner,

v.

CITY OF CLEVELAND, *et al.*,
and
VANGUARDS OF CLEVELAND,

Respondents.

BRIEF *AMICI CURIAE* OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH ON BEHALF OF ITSELF AND THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does Title VII authorize the imposition of court-ordered promotion quotas which adversely affect seniority rights and mandate preferences for minority employees as a form of class-based relief for past discrimination?

2. Are court-ordered racial and ethnic preferences in public employment which confer benefits on nonvictims, penalize innocent third parties and do not target identifiable victims of past discrimination violative of Fourteenth Amendment equal protection guarantees?

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Consent of the Parties

Petitioner and Respondents have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court.

INTEREST OF THE *AMICI CURIAE*

For over seventy years, the Anti-Defamation League of B'nai B'rith has pursued the objective set out in its charter, "to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against and ridicule of any sect or body of citizens." Among its other activities directed to these ends, the Anti-Defamation League has in the past filed *amicus* briefs in this Court urging the unconstitutionality or illegality of discriminatory laws or practices in such cases as *Shelley* v. *Kraemer*, 334 U.S. 1 (1948); *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1969); *San Antonio Indep. School District* v. *Rodriguez*, 411

U.S. 1 (1973); *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974); *Runyon* v. *McCrary*, 427 U.S. 160 (1976); *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976); *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978); *United Steelworkers of America, AFL-CIO-CLC* v. *Weber*, 443 U.S. 193 (1979); *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980); *Boston Police Patrolmen's Ass'n, Inc.* v. *Castro*, 461 U.S. 477 (1983); *Palmore* v. *Sidoti*, ___ U.S. ___, 104 S. Ct. 1879 (1984); *Hishon* v. *King & Spaulding*, ___ U.S. ___, 104 S. Ct. 2229 (1984); *Memphis Fire Department* v. *Stotts*, ___ U.S. ___, 104 S. Ct. 2576 (1984); and *Wygant* v. *Jackson Board of Education*, No. 84-1340 (U.S. *cert. petition granted* April 15, 1985).

The National Jewish Commission on Law and Public Affairs ("COLPA") is the volunteer non-profit membership organization of lawyers and social scientists that represents the Orthodox Jewish community in public forums on legal issues that affect the community. We appear in this case on behalf of a broad spectrum of the American Orthodox Jewish community, including the major national Orthodox Jewish rabbinic, synagogal, educational and social service organizations which represent the broad spectrum of the Orthodox Jewish community in this country.

COLPA has participated *amicus curiae* in numerous cases before this Court. *See, e.g., Board of Education* v. *Allen*, 392 U.S. 236 (1968); *Walz* v. *Tax Commission*, 397 U.S. 664 (1970); *Dewey* v. *Reynolds Metals Co.*, 402 U.S. 689 (1971); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973); *Wheeler* v. *Barrera*, 417 U.S. 402 (1974); *Parker Seal Co.* v. *Cummins*, 429 U.S. 65 (1976); *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977); *Widmar* v. *Vincent*, 454 U.S. 263 (1981); *Mueller* v. *Allen*, 463 U.S. 388 (1983).

In many of these cases, *amici* has relied on the protection afforded by the Fourteenth Amendment and on the prohibitions of the Civil Rights Act of 1964 and other civil rights statutes, to support the rights of individuals, regardless of their race, religion,

sex or national origin. While many early suits brought by individuals victimized by debilitating, often legally-sanctioned discrimination were successful, the 1970's ushered in a new concept of civil rights. Equality of *results* replaced the long-sought equality of *opportunity* guaranteed by the Constitution and federal laws. Racial, ethnic and gender quotas are now hailed as *remedies* for discrimination.

Amici wholeheartedly endorse and encourage the concept and application of legitimate affirmative action. Educational institutions, industry and government have an obligation to provide relief for those individuals who continue to suffer from the lingering effects of past discrimination, and for those who remain the victims of current discriminatory practices. Inadequate education and job skills, lack of vocational training and financial need trigger the necessity for programs in the private and public sectors which target disadvantaged individuals of all races, gender and national origin.

However, the stimulus for affirmative action must remain firmly rooted in the concept of individual rights. Goals and quotas constitute class-based preferences which rely on the concept of racial proportionality, structuring "remedies" by reference to demographic analysis. This view of affirmative action bestows preferences on individuals on the basis of their membership in a given racial, gender or ethnic class, the same basis which Congress declared unlawful in 1964. Now, however, we are told that the preference is "benign" rather than discriminatory. *Amici* reject such Orwellian logic. No classification of individuals by race, religion, gender or national origin, whether for the purpose of imposing a penalty or conferring a benefit, can ever be "benign." "If the Constitution prohibits exclusion of blacks and other minorities on racial grounds it cannot permit the exclusion of whites on similar grounds; for it must be the exclusion on racial grounds which offends the Constitution, and not the particular skin color of the person excluded." Bickel, *The Morality of Consent*, 132-133 (1975).

The principle of nondiscrimination teaches us that every individual is entitled to compete and must be evaluated on the basis of his or her own merit and potential, not as a matter of political expediency or business convenience, but because discrimination is illegal, immoral, unconstitutional and destructive of democratic society.

The racial and ethnic preferences at issue in this case present the Supreme Court with the opportunity to reestablish the principle of individual rights upon which our Constitution is founded and to revitalize the protection against discrimination contained in our laws. *Amici* urge the Court to reverse the judicially-sanctioned discrimination imposed by the courts below.

STATEMENT OF THE CASE

Amici incorporate the statement of the case as set forth in the Brief for the Petitioner.

SUMMARY OF ARGUMENT

The court-ordered promotion quotas contained in a consent decree entered into by the City of Cleveland and minority firefighters fail under Title VII and the equal protection clause of the Fourteenth Amendment. The quotas must be evaluated under Title VII as a court-ordered remedy, rather than as a voluntary contractual arrangement between the City and minority firefighters. Section 706(g), prescribing appropriate remedial relief under the statute, limits affirmative action to that which is tailored to remedy proven discrimination and which is lawful under the provisions of Title VII.

As such, the preferences are invalid under the plain language of §703(a), which prohibits employment classifications on the basis of race and ethnicity, and §703(h), which protects legitimate seniority systems. The promotion quotas at issue are based on race and ethnicity, and disregard the City's established seniority system, thereby violating the statute. In addition, the legislative history of the statute makes clear that Congress did not intend to

authorize either employers or courts to institute discriminatory, class-based preferences.

The decision of this Court in *Memphis Fire Department v. Stotts*, 104 S. Ct. 2576 (1984), striking down court-ordered racial preferences on the basis of membership in a disadvantaged class, is controlling in this case. In *Stotts*, this Court ruled that a district court has no authority under §706(g) to order the implementation of racial preferences in abrogation of seniority rights. That ruling mandates this Court to strike down the promotion quotas at issue as invalid under Title VII.

The promotion quotas are also violative of the Fourteenth Amendment's equal protection clause. In creating racial and ethnic classifications, the quotas fail to satisfy the applicable constitutional standard of strict scrutiny. This two-fold analysis mandates that racial classifications be justified by a compelling state interest and be narrowly tailored to serve that interest. While the City of Cleveland has a compelling interest in eradicating the effects of past discrimination, the promotion quotas are not narrowly tailored to serve this interest.

The use of promotion quotas as a "remedy" to relieve the effects of past discrimination is both underinclusive and overinclusive. The court-ordered remedy does not identify the victims of past discrimination. As such, this relief fails to target the needy individuals. Therefore, instituting the promotion quotas will not alleviate the effects of past discrimination. Additionally, those minorities not the victims of past discrimination benefit while nonminorities now suffer the effects of present discrimination. No compelling interest is served by benefiting convictims and discriminating against innocent third parties.

Even assuming, *arguendo*, that this Court adopts a weaker constitutional standard, the promotion quotas would still run afoul of equal protection concerns. The less exacting standard developed in the federal appellate courts requires a remedy to serve an important government objective and to be substantially related to the achievement of those ends. Racially discriminatory promotion quotas cannot satisfy either prong of this test.

ARGUMENT

I.

RACIAL AND ETHNIC QUOTAS CANNOT BE JUSTIFIED AS REMEDIAL AFFIRMATIVE ACTION UNDER TITLE VII

The validity of a consent decree entered for the purpose of settling Title VII litigation must be evaluated under the terms of that statute. "[T]he District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce." *System Federation No. 91 v. Wright*, 364 U.S. 642, 651 (1961). The Supreme Court, in *Wright*, reviewed a lower court's authority to modify a consent decree, entered into by a railroad and its employees, in light of subsequent changes in the Railway Labor Act. Justice Harlan, writing for the majority, stated: "In short, it was the [Railway Labor] Act, and only incidentally the parties, that the District Court served in entering the consent decree now before us. The court must be free to continue to further the objectives of that Act when its provisions are modified." *Id.* Thus, any review of the promotion quotas at issue must rely on the provisions of Title VII. *Memphis Fire Department v. Stotts*, ____U.S.____, 104 S. Ct. 2576, 2587 n.9 (1984), and serve the statute's objective of nondiscriminatory employment practices.

A. The Promotion Quotas Must Be Evaluated As Court-Ordered Relief Under Title VII

The legality of the promotion scheme raises the issue of a court's remedial powers under Title VII. The fact that the promotion quotas are contained in a consent decree which was negotiated by the city and a group of minority firefighters does not render the plan voluntary, as the Sixth Circuit erroneously concluded. *United States v. Swift & Co.*, 286 U.S. 106, 114-115 (1932) ("The result is all one whether the decree has been entered after litigation or by consent .... We reject the argument ... that a decree entered upon consent is to be treated as a contract and not as a judicial act."). The City of Cleveland

agreed to change its promotion procedure only after a discrimination lawsuit was filed. The final plan was incorporated as "Amended Consent Decree of the District Court." *Cert.* Petition at A29. As the dissenting judge in the Sixth Circuit observed: "The decree on its face recites, 'IT IS THEREFORE ORDERED, ADJUDGED AND DECREED,' and then explains in detail what actions the defendants are required to take to comply with the order." *Id.* at A26 (Kennedy, J. dissenting).

In fact, the implementation of the Cleveland consent decree contains more elements of compulsion than voluntariness. Although the court below permitted Petitioner to intervene, the final consent decree was negotiated only by the City of Cleveland and the Vanguards, an association of black and Hispanic firefighters. *Cert.* Petition at 4. The district court entered judgment adopting the decree over the union's objections to the ethnic and racial quotas contained therein.[1] Justice O'Connor, analyzing the significance of a consent decree in a Title VII context, concluded that, "if innocent employees are to be required to make any sacrifices in the fo[illegible] consent decree, they must be represented and have had full participation rights in the negotiation process." *Stotts*, 104 S. Ct. at 2593 n.3 (O'Connor, J., concurring).

It is plain to see that the innocent parties affected by the quotas here at issue, were not fully represented in the negotiation of this decree. The plan that was ordered implemented by the court was negotiated only by the City and by the Vanguards, which represents black and Hispanic firefighters, and rejected by 88% of the members of the representative union. The promotional quota was, in every sense, imposed by court order upon the Cleveland Fire Department, and consequently, upon all interested parties. In order to be upheld, therefore, the promotion quotas must be a lawful exercise of judicial authority under Title VII.

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1. The membership of Local 93, International Association of Firefighters, AFL-CIO, C.L.C., Petitioner herein, rejected the proposed promotion plan by a vote of 660-89. Consent Decree, *Cert.* Petition at A31.

B. Neither the Language Nor the Legislative History of Title VII Authorizes Racial and Ethnic Preferences

Under *Wright*, 364 U.S. 642, 651, reaffirmed by the majority in *Sheetz*, 104 S. Ct. at 2587 n.9, the sole authority for court-ordered relief is found in the statute which the parties before the court seek to enforce. Striking down an injunction ordering racial preferences, the *Sheetz* majority ruled that "holding [the injunction] permissible as a valid Title VII remedial order ignores not only our ruling in *Teamsters* but the policy behind §706(g) as well."104 S. Ct. at 2590.

Section 706(g) of Title VII authorizes courts to "order such affirmative action *as may be appropriate*" in order to provide relief for unlawful employment practices. 42 U.S.C. §2000e-5(g) (emphasis added). Applying the principle that, whenever possible, statutory terms should be interpreted by their ordinary meaning, *Burns v. Alcala*, 420 U.S. 575, 580-581 (1975), it is apparent that "appropriate" relief under §706(g) does not encompass racial and ethnic quotas. The term "appropriate" is defined as "suitable; fit; proper." Webster's New World Dictionary 28 (1973). In order to apply this definition, the limits of appropriate remedial relief under Title VII must be understood in the context of the entire statute. In its broadest application, appropriate affirmative action is limited to that which is tailored to remedy the proven discrimination, 42 U.S.C. §2000e-5(g), and which is itself lawful under Title VII, *Sheetz*, 104 S. Ct. at 2586. The promotion quotas ordered by the court violate both elements of this standard.

A court's remedial power under this provision is premised on a finding that the "respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint."42 U.S.C. §2000e-5(g). In 1980, the Vanguards alleged that the City discriminated in promoting firefighters by, among other things, the use of unfair written tests and seniority points and the failure to hold a promotion examination since 1975. *Cert.* Petition at A2. Assuming, *arguendo*, that the consent decree constitutes a court finding or an admission of

discrimination, a fair understanding and implementation of §706(g) might result, for example, in the court ordering that validated, job-related promotion tests be used by the City and that the City hold an examination in order to certify a current promotion list. Both practices address the alleged discrimination and comport with statutory requirements. *See* Uniform Guidelines On Employee Selection Procedures, 29 C.F.R. §§1607.3, 1607.12 (1978). While the consent decree contains provisions stipulating both procedures, it goes far beyond appropriate affirmative action by requiring the immediate promotion of thirty-three minority firefighters to lieutenant, the promotion of all minority employees eligible for the positions of Assistant Chief, Battalion Chief and Captain, and the use of proportional minority goals through 1987. *Cert.* Petition at A35. Far from being "appropriate," this scheme exceeds the statutory limits of a court's remedial power. Not only does the consent decree order promotions based on race and ethnicity, an unlawful employment practice under Title VII, but it calls for a promotion scheme which significantly interferes with the fire department's established seniority system, explicitly protected under Title VII. 42 U.S.C. § 2000e-2(h).

The racially and ethnically-based promotion scheme fashioned through negotiation between the City of Cleveland and the Vanguards and ordered implemented by a U.S. district court on its face violates the letter and spirit of the Civil Rights Act of 1964. Section 703(a) of Title VII unambiguously declares it to be an unlawful employment practice for an employer --

> [T]o discriminate against an individual with respect to . . . conditions of employment . . . or . . . to . . . classify his employees . . . in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race . . . or national origin. 42 U.S.C. §2000e-2(a)

No emphasis in statutory language is necessary to deduce that the City of Cleveland has discriminated against every firefighter

— minority and nonminority — by classifying them racially and ethnically and thereafter promoting employees on the basis of that classification. As this Court has recognized, "[t]he statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual or national class." *City of Los Angeles, Dep't of Water v. Manhart*, 435 U.S. 702, 708 (1978).

It is equally axiomatic that Title VII protection extends to *all* individuals. The statute's "terms are not limited to discrimination against members of any particular race . . . . This conclusion is in accord with uncontradicted legislative history to the effect that Title VII was intended to 'cover white men and white women and all Americans' . . . and create an 'obligation not to discriminate against whites' . . . ." *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 279-280 (1976) (citations omitted).

The legislative history of Title VII makes clear that class-based distinctions are anathema to the statute. Even a cursory review of statements made by the bill's sponsors and supporters removes any doubt as to congressional intent. Senator Hubert Humphrey, perhaps the single most instrumental force behind the passage of the civil rights law, defined the actions it proscribed: "[T]he meaning of racial or religious discrimination is perfectly clear . . . . [I]t means a distinction in treatment given to different individuals because of their different race, religion, or national origin." 110 Cong. Rec. 5423 (1964). Senator Humphrey stated unequivocally, "nothing in the bill would permit any employer or labor union to give preferential treatment to any minority group." *Id.*

Legislators with almost prophetic foresight envisioned the bill's application to so-called affirmative action plans and explicitly delineated its remedial limitations: "Even [a] court could not order that any preference be given to any particular race, religion or other group, but would be limited to ordering an end of discrimination." 110 Cong. Rec. 1519 (1964) (Rep. Celler). Although the record is replete with references to the effect that the bill prohibits racial preferences, Senator Humphrey's emphatic description of the legislation is particularly relevant:

> Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require hiring, firing or promotion of employees in order to meet a racial "quota" or to achieve a certain racial balance.
>
> That bugaboo has been brought up a dozen times; but it is nonexistent. In fact, the opposite is true. Title VII prohibits discrimination. In effect it says that race, religion and national origin are not to be used as the basis for hiring and firing. Title VII is designed to encourage hiring on the basis of ability and qualifications, not race or religion. 110 Cong. Rec. 6549 (1964).

C. The Racial and Ethnic Quotas Violate §703(h) By Interfering With the Fire Department's System of Promotions Based In Part On Seniority

Prior to the consent decree, promotion from firefighter to lieutenant was based on a combination of factors including an individual's examination score, experience in the department and seniority. *Cert.* Petition at 5. The Sixth Circuit noted that "employees with *greater seniority* were given a slight advantage in the promotional process." *Id.* at A13. It is difficult to understand how the appellate court concluded that the promotion scheme "plainly does not interfere with any seniority rights." *Id.* The dissenting judge accurately characterized the effect of the promotion quota on firefighter seniority:

> The consent decree in this case in effect gives minority firefighters superseniority over all non-minority firefighters for promotion purposes, at least until certain quotas are reached . . . . The decree now requires that minority firefighters who pass the examination be promoted ahead of non-minority firefighters who would otherwise be entitled to promotion by virtue of their seniority and examination score. Each promotion list based in part on seniority, has been split into two. *Id.* at A22. (Kennedy, J. dissenting).

The consent decree calls for sixty-six immediate promotions from firefighter to lieutenant which are to be made by coupling

minority and nonminority appointments. The operation of a one-to-one quota necessarily displaces those with more seniority in favor of firefighters with less seniority, in order to fill the quota with the "correct" percentages of minority and nonminority employees. In addition, the ordered promotion of all minorities eligible for the positions of Captain, Battalion Chief and Assistant Chief completely overrides the seniority of nonminorities who are also eligible for these positions.

This Court, in *Stotts*, 104 S. Ct. 2576, held that under Title VII, a court may not, as a remedial measure, order an employer conducting layoffs to utilize a racial preference which abrogates seniority rights, when those favored have not been identified as victims of prior discrimination. That decision is controlling here, and mandates that the Cleveland Fire Department's promotion quota be struck down.

In *United Steelworkers of America, AFL-CIO-CLC* v. *Weber*, 443 U.S. 193 (1979), a five-member majority of the Court upheld a provision in a collective bargaining agreement between a representative union and an employer which required a 50% minority set-aside for entrance into a craft training program. Justice Brennan, delivering the opinion of the Court, stated,

> [W]e are not concerned with what Title VII requires or with what a court *might order* to remedy a past proven violation of the Act. The only question before us is the narrow statutory issue of whether Title VII *forbids* private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences . . . . *Weber*, 443 U.S. at 200 (emphasis in original).

The Court's approval of a valid affirmative action plan in *Weber* is limited to the context of a private employer and a voluntarily adopted plan. In the case at issue, however, *a federal court has ordered a public employer* to implement racial and ethnic preferences as set out in a consent decree which the employee union overwhelmingly rejected. Thus, the *Weber* standards do not govern the instant case.

In *Stotts*, citing *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), this Court stated,

> [M]ere membership in the disadvantaged class is insufficient to warrant a seniority award; each individual must prove that the discriminatory practice had an impact on him . . . . Here, there was no finding that any of the blacks protected from layoff had been a victim of discrimination . . . . Nor had the parties in formulating the consent decree purported to identify any specific employee entitled to particular relief . . . . *Stotts*, 104 S. Ct. at 2588.

The Sixth Circuit distinguished *Stotts* by misinterpreting the facts in the case at issue and by failing to apply the teaching of that decision. Other lower courts have similarly avoided the *Stotts* ruling by relying on superficial factual distinctions.[2] This

2. *Deveraux* v. *Geary*, 765 F.2d 268, 273-274 (1st Cir. 1985) (distinguishing *Stotts* because the instant case involved a challenge to a consent decree provision to which the original parties agreed and did not involve seniority rights or a disclaimer of discrimination), *cert. petition filed*, 54 U.S.L.W. 3229 (U.S. Sept. 9, 1985) (No. 85-492); *Turner* v. *Orr*, 759 F.2d 817, 823-826 (11th Cir. 1985) (*Stotts* not applicable because the case at issue did not involve infringement of a bona fide seniority system, or identify third party rights, and consent decree authorized remedy), *cert. petition filed*, 54 U.S.L.W. 3086 (U.S. July 31, 1985) (No. 85-177); *Equal Employment Opportunity Commission* v. *Local 638 . . . Local 28 of the Sheet Metal Workers' Int'l Ass'n*, 753 F.2d 1172, 1186 (2d Cir. 1985) (distinguishing *Stotts* because here there was no conflict with bona fide seniority plan protected under § 703(h), there was prospective relief rather than retroactive make-whole relief and there was a finding of intentional discrimination), *cert. granted*, 54 U.S.L.W. 3223 (U.S. Oct. 7, 1985) (No. 84-1656); *Van Aken* v. *Young*, 750 F.2d 43, 45 (6th Cir. 1984) (distinguishing *Stotts* because the affirmative action plan at issue was voluntarily adopted, pertained to hiring and was unrelated to seniority rights); *Wygant* v. *Jackson Board of Education*, 746 F.2d 1152, 1157-1158 (6th Cir. 1984) (*Stotts* does not affect a seniority layoff plan contained in a collective bargaining agreement), *cert. granted*, ___U.S. ___, 105 S. Ct. 2015 (1985) (No. 84-1340); *Kromnick* v. *School District of Philadelphia*, 739 F.2d 894, 911 (3rd Cir. 1984) (distinguishing *Stotts* because teacher transfer plan at issue did not require "overriding of a bona fide seniority plan" nor "race-conscious layoffs"), *cert. denied*, ___ U.S. ___, 105 S. Ct. 782 (1985); *Grano* v. *City of Madison*, 710 F.2d 786, 795 n.5 (7th Cir.) (*Stotts* distinguished because in this case the discrimination was acknowledged, the defendant agreed to the relief provided and no seniority rights were involved), *cert. denied*, ___U.S. ___, 105 S. Ct. 296 (1984).

Court should clearly reject judicially-conferred class-based relief to nonvictim members of a racial or ethnic group. *Stotts*, 104 S. Ct. at 2586-2590.

The Cleveland consent decree is not voluntary, but constitutes a court order, *see* Section I, A, *supra*, with all the force of the injunction at issue in *Stotts*. *Wright*, 364 U.S. 642, 651; *Swift*, 286 U.S. 106, 114-115. The fact that the racial preference in *Stotts* involved layoffs, while the Cleveland district court ordered a promotion quota, is a distinction which should not lead to a different result. The use of discriminatory preferences in layoffs and promotions exceeds a court's authority under § 706(g). Both constitute unlawful employment practices by classifying individuals by race and ethnicity. In the case at issue, as in *Stotts*, the court-ordered "remedy" interferes with legitimate seniority rights. Further, it does not involve the use of a voluntary arrangement found permissible in *Weber*.

The basis of the majority opinion in *Stotts* is not the layoffs, *per se*, but rather the Supreme Court's rejection of a judicially-enforced "remedy" which imposes class-based preferences at the expense of individual rights. The *Stotts* ruling, therefore, precludes a court's interference with seniority rights absent identification of specific victims.

II.

THE ETHNICALLY AND RACIALLY-BASED PROMOTION QUOTAS CONTAINED IN THE CONSENT DECREE VIOLATE THE EQUAL PROTECTION CLAUSE

A. The Constitutional Standard of Strict Scrutiny Applies for Classifications Based On Race

The court-ordered promotion quotas implemented by the City of Cleveland classify government employees by race and by national origin, thereby violating the equal protection clause. A classification based on race "must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment

was to eliminate racial discrimination emanating from official sources in the states. This strong policy renders racial classifications 'constitutionally suspect,' *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954), and subject to the 'most strict scrutiny,' *Korematsu* v. *United States*, 323 U.S. 214, 216 (1944)." *McLaughlin* v. *Florida*, 379 U.S. 184, 192 (1964). This Court, in *Palmore* v. *Sidoti*, ____ U.S. ____, 104 S. Ct. 1879, 1882 (1984), reiterated these propositions, adding that for racial classifications "to pass constitutional muster they must be justified by a compelling governmental interest and must be necessary . . . to the accomplishment of its legitimate purpose. *McLaughlin* v. *Florida*, 379 U.S. at 196." *See also Dunn* v. *Blumstein*, 405 U.S. 330, 342 (1972), citing *Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969); *Kramer* v. *Union School District*, 395 U.S. 621, 627 (1969). Even if these criteria are met, the party attempting to justify the classification must show that it is drawn with "precision," *Dunn*, 405 U.S. at 343, citing *NAACP* v. *Button*, 371 U.S. 415, 438 (1963); *United States* v. *Robel*, 389 U.S. 258, 265 (1967), and that it is "precisely tailored" to serve legitimate governmental objectives, *Dunn*, 405 U.S. at 343, citing *Shapiro* v. *Thompson*, 394 U.S. at 631.

There is no basis for a different analysis under strict scrutiny simply because the claimants are not members of a class historically subjected to discrimination. The Sixth Circuit in *Bratton* v. *City of Detroit*, 704 F.2d 878, 886 (6th Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S. Ct. 703 (1984), stated that it was applying the strict scrutiny standard to a voluntarily adopted promotion quota. In fact, the appellate court applied a lesser standard.[1] In that case, the appellate court upheld a racial quota after finding it a "reasonable" measure and identifying "a governmental interest." This standard is considerably lower than the traditional strict scrutiny analysis applied to racial distinctions. The court in *Bratton* justified its analysis by recognizing that it was dealing

1. Other circuits have adopted lesser standards. This will be discussed in Section II, C, *infra*.

with a "unique form of constitutional analysis commanding somewhat unique considerations." 704 F.2d at 886 n.28. The uniqueness which impressed the court in *Bratton* was based on its prior decision in *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 697 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981): "[A] case involving a claim of discrimination against members of the white majority is not a simple mirror image of a case involving claims of discrimination against minorities." In effect, the Sixth Circuit has bifurcated the protection of the Fourteenth Amendment: equal protection guarantees mean one thing to minorities and another to nonminorities. This dual standard completely emasculates the equal protection clause. Thus, the same standard of strict scrutiny should apply here, even where the victims of the discrimination are not those traditionally viewed as victims of racial discrimination. Racial discrimination is suspect because it is violative of a constitutional standard of general application, not one available only to members of one race.

It is beyond dispute that the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948). *See also Missouri ex rel Gaines v. Canada*, 305 U.S. 337, 351 (1938); *McCabe v. Atchison, Topeka & Santa Fe Railway Co.*, 235 U.S. 151, 161-162 (1914). Surely, "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal." *Regents of the University of California v. Bakke*, 438 U.S. 265, 289-290 (1978). *See also DeFunis v. Odegaard*, 416 U.S. 312, 337 (1974) (Douglas, J., dissenting). Equal protection is a matter of "fundamental principle" and not simply "a matter of whose ox is gored." Bickel, *The Morality of Consent* 133 (1975).

Strict scrutiny applies even though the victims are not a "discrete and insular minority" requiring extraordinary protection from the majoritarian political process." *Bakke*, 438 U.S. at 290, quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 152-153 (1938). Justice Powell, author of the plurality opinion in *Bakke*, stated that the Supreme Court has not held that these elements are "necessary preconditions to holding that a particular classification is invidious." *Bakke*, 438 U.S. at 290. Thus, where classifications are based on race, no showing of relative political powerlessness is necessary to justify strict scrutiny.

Moreover, the assertion that strict scrutiny applies only to racial discrimination against disadvantaged groups lacking controlling political power distorts the meaning of the equal protection clause. There is no evidence that those who framed, proposed and ratified the Fourteenth Amendment meant its protection to apply only to blacks. Rather, their intention was to create a principle of universal application to be employed by anyone who suffers the effects of discrimination, whatever his or her race or ethnic origin. This view is embodied in this Court's interpretations of the equal protection clause, assuring all persons "the protection of equal laws." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). The Supreme Court has consistently held that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

Additionally, a standard for constitutional scrutiny predicated upon whether a preference benefited a "minority" or a "majority" would mire the courts in highly sensitive political assessments. This Court would find itself in the difficult position of constantly weighing and re-evaluating the relative ranking of various groups in an effort to confer a preference on those most deserving. Clearly, the equal protection clause was not meant to acquire such an "accordian-like quality." *DeFunis*, 416 U.S. at 343 (Douglas, J., dissenting). Additionally, "[t]he kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence -- even if they were politically feasible and socially desirable." *Bakke*, 438 U.S. at 297.

The integrity of the equal protection clause will be preserved only by applying consistently a standard of strict scrutiny to all

distinctions based on race and national origin. Any weakening of that principle inevitably weakens the degree of protection accorded all individuals under the Fourteenth Amendment.[4]

B. The Ethnic and Racial Promotion Quotas Are Not Narrowly Tailored to Serve a Compelling Government Interest

It is beyond question that eradicating the effects of past discrimination by providing make-whole relief for individual victims of discrimination is a compelling governmental interest. However, no compelling interest is served by granting class-based racial preferences to all members of a minority group, on the grounds that unidentified individuals may have suffered discrimination.

The objective of the equal protection clause is to secure individual rights, not group rights. *Shelley* v. *Kraemer*, 334 U.S. 1, 22 (1948). Thus, it is only those measures narrowly tailored to benefiting individual victims of discrimination that can be justified as a "remedy" for infringement of equal protection guarantees. Minority groups are not protected as *classes* under the Fourteenth Amendment but, rather, as *individuals*. The injury suffered by a victim of discrimination is neither ameliorated nor

4. While neither *Bakke* nor *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980), produced a majority opinion for the Court, five Justices have endorsed the strict scrutiny standard as applied to equal protection claims of "reverse discrimination" in those cases. In Justice Powell's plurality opinion in *Bakke*, 438 U.S. at 291, he stated, "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." Justice White joined this portion of the plurality opinion. *Id.* at 387 n.7.

In *Fullilove*, Justice Stewart, joined by Justice Rehnquist, declared that racial and ethnic classifications are "inherently suspect and presumptively invalid." 448 U.S. at 523. In a concurring opinion, Justice Powell agreed that racial classifications "require strict scrutiny." *Id.* at 496-497 n.1 (Powell, J., concurring). Justice Stevens, in a separate dissent also recognized the application of strict scrutiny to racial classifications by the state. *Id.* at 548-551 (Stevens, J., dissenting).

Several members of this Court have advocated a somewhat less exacting standard, but they have, nevertheless, insisted on a "strict and searching" judicial inquiry. *See Bakke*, 438 U.S. at 362 (opinion of Brennan, White, Marshall, and Blackmun, JJ.); *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring).

remedied by conferring employment preferences upon randomly selected members of the victims' race or national origin, or upon members of other minorities.

Categorical preferences cannot be regarded as precisely tailored to remedy discrimination. Where a court-ordered remedy is at issue, such as in this case, this Court has always required that it be narrowly tailored to fit "the nature and extent of the violation constitutionally" proved. *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 420 (1977).[5] This means, as Justice Stewart stated in *Fullilove*, 448 U.S. at 530 n.12, that "[e]xcept to make whole the identified victims of racial discrimination, the guarantee of equal protection prohibits the government from taking detrimental action against innocent people on the basis of the sins of others of their own race." Justice Stevens recognized the same principle in *Fullilove*, 448 U.S. at 541, when he observed that the statutory preference could not "be justified as a remedial measure" for firms that had not been "wrongly excluded from the market for public contracts."[6]

5. Even if the promotion quotas are viewed as voluntary, there is still an obligation under Title VII to identify specific victims in devising a remedy for past discrimination. *Stotts*, 104 S. Ct. 2576.

6. In *Fullilove*, neither the plurality opinion nor that of Justice Powell approved the award of benefits to nonvictims at the expense of innocent third parties. In the plurality opinion, the Chief Justice stressed that the Court was considering only a facial challenge to the minority set-aside provision and that equal protection claims arising out of specific awards "cannot be justified . . . as a remedy for the present effects of identified prior discrimination . . . [but] must await future cases." 448 U.S. at 486. The Chief Justice also emphasized Congress' intention that a preference should be given to only those firms "whose competitive position is impaired by the effects of disadvantage and discrimination," *id.* at 471, and that the administrative process would prevent misapplications of Congress' goals. *Id.* at 487-489. Here, in contrast, no effort whatsoever was made to inquire whether those preferred at the expense of nonminority applicants were the actual victims of discrimination or disadvantage.

The *Fullilove* plurality opinion cannot be read as an endorsement of a preference based solely on race. Chief Justice Burger, reviewing the enactment of the Minority Business Enterprise provision, noted that in the House committee report, "minority" was defined, not racially, but as

It is clear that the court-ordered promotion quotas would not necessarily benefit those who have been the victims of discrimination. Additionally, those not shown to have been subject to racial or ethnic discrimination would be promoted while innocent third parties would be left wanting. Therefore, by being both overinclusive and underinclusive in the disbursement of benefits, the promotion quotas are not narrowly tailored to serve a compelling state interest.

As discussed above, racial discrimination is violative of the equal protection clause. The nonminority victims of the quota are denied the benefits of seniority, as minority firefighters with less seniority are promoted ahead of them. This discriminates against nonminority firefighters by frustrating their expectation of future promotions and benefits and infringes upon their guarantee of equal protection. Although a valid remedy for individual discrimination may require some sharing of the burden by innocent parties, *see Fullilove*, 448 U.S. at 484; *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 777 (1976); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), the law requires that victims simply be placed in the situation that would have existed had the discrimination not occurred. But unless a remedy benefits an actual victim of discrimination, "the government has [no] greater interest in helping one individual than in refraining from harming another." *Bakke*, 438 U.S. at 309.

"economically or socially disadvantaged." 448 U.S. at 471. The congressional set-aside also benefited minority business enterprises "whose competitive position is impaired by the effects of disadvantage and discrimination." *Id.*

Moreover, the minority set-aside at issue in *Fullilove* was enacted by Congress pursuant to its unique enforcement powers under Section 5 of the Fourteenth Amendment. As the *Fullilove* plurality opinion repeatedly emphasized, the deferential analysis employed in that case was adopted precisely and only because the challenged set-aside was enacted pursuant to this express constitutional grant of congressional enforcement authority. *Fullilove*, 448 U.S. at 472, 476-480; *Id.* at 499-502, 508-510, 515-516 n.14 (opinion of Powell, J., concurring). Thus, when acting to effectuate the demands of the equal protection clause, Congress has extraordinarily "broad remedial powers" that exceed even those of the judiciary. *Fullilove*, 448 U.S. at 483. The City of Cleveland has, of course, no remedial authority comparable to that granted Congress under the enforcement clause of the Fourteenth Amendment.

C. Even Under a Lesser Standard, the Court-Ordered Promotion Quotas Violate the Equal Protection Clause

In their attempt to determine the appropriateness of racial classifications, lower federal courts have created a lesser constitutional standard.[7] A variety of standards has resulted, focusing on whether a racial classification serves an important government objective and is substantially related to achievement of those ends. This type of analysis examines factors such as whether the affirmative action plan is related to the remedial aim, and the effect of the plan on innocent third parties. *Bratton*, 704 F.2d at 892; *Kromnick*, 739 F.2d at 904. Under these "intermediate" standards, which have been shaped in the context of voluntarily adopted affirmative action plans, the promotion quota is discriminatory and violates the equal protection clause.

To the extent that the Sixth Circuit, in the case at issue, applied the lesser standard articulated in *Bratton*, 704 F.2d at 892, and *Young*, 608 F.2d at 697, its analysis is erroneous. The remedial plan adopted in the consent decree is not reasonable because the promotion quota does not achieve the objective of eradicating past discrimination. The plan in no way purports to remedy the rights of any identifiable victims of discrimination, and, in fact, rewards nonvictims.

Additionally, the promotion quotas fail because the interests of the nonminorities have been "unduly trammelled." *Each nonminority firefighter* has been denied promotion and future benefits, and, therefore, his or her own equal protection rights have been violated. Because these rights are personal rights, they must be accorded the highest protection. Moreover, the harm to the nonminorities exceeded "a simple reduction in non-minority 'expectations.'" *Cert.* Petition at A10. The nonminorities were

7. In addition to *Bratton*, 704 F.2d 878, 886, *see also Kromnick*, 739 F.2d 894, 903; *Janowiak* v. *Corporate City of South Bend*, 750 F.2d 557, 563 (7th Cir. 1984), *cert. petition filed*, 53 U.S.L.W. 3896 (U.S. June 10, 1985) (No. 84-1936); *Valentine* v. *Smith*, 654 F.2d 503 (8th Cir. 1980).

subject to racial and ethnic discrimination, deprived of the benefits of seniority and subjected to unnecessary delays in promotion.

Thus, even a finding of discrimination cannot support the racial preferences contained in the court-ordered promotion quotas. Such a plan could not be "narrowly tailored" to achieve the relevant objective of providing relief for identifiable victims of discrimination. The racially and ethnically discriminatory promotion quotas were ordered even though no victims of discrimination were identified and targeted for relief. Innocent third parties were subject to discrimination, while those who had not been victims were given promotions. Promotion quotas that grant preferential treatment to individuals who have not been the victim of discrimination are not remedial and, therefore, are not narrowly tailored to serve a compelling governmental interest.

CONCLUSION

The linchpin of the civil rights movement and the legislation it inspired is equality of opportunity. Justice Rehnquist recognized this principle as the "spirit" of Title VII:

> There is perhaps no device more destructive to the notion of equality than the *numerus clausus* -- the quota. Whether described as "benign discrimination" or "affirmative action," the racial quota is nonetheless a creator of castes, a two-edged sword that must demean one in order to prefer another. In passing Title VII, Congress outlawed *all* racial discrimination, recognizing that no discrimination based on race is benign, that no action disadvantaging a person because of his color is affirmative. *Weber*, 443 U.S. at 254 (Rehnquist, J., dissenting).

In order to restore and secure the concept of equality, this Court must definitively put an end to distinctions which serve only to distort individual rights. Guarantees of equal opportunity and equal protection are meaningless when the race, sex, religion or ethnicity of an individual determines the degree of protection accorded under the law. If we are to create a society free of

debilitating stereotypes, patronizing awards of benefits, and arbitrary imposition of burdens, we must ensure that the spirit of equality, enacted into law in 1964, is a reality for *all* individuals.

For the foregoing reasons *amici* submit that the judgment of the Sixth Circuit, upholding racially and ethnically-based promotion practices, must be reversed.

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AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
DEC 2 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1999

In the Supreme Court of the United States

OCTOBER TERM, 1985

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, C.L.C., PETITIONER

v.

CITY OF CLEVELAND, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether a judgment entered with the consent of a defendant public employer in an action brought under Title VII of the Civil Rights Act of 1964 may award racial preferences in promotions to persons who are not the actual victims of the employer's discrimination.

2. Whether a consent judgment may be entered over the objection of an intervenor of right whose interests are adversely affected by the terms of the consent judgment.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1999

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, C.L.C., PETITIONER

v.

CITY OF CLEVELAND, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This Court's resolution of the issues presented in this case will have a substantial effect on the Attorney General's enforcement responsibilities under Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. I), 2000e-5(f)(1). The federal government also is subject to the requirements of Title VII in its capacity as an employer. 42 U.S.C. 2000e-16.

STATEMENT

We summarized the factual and procedural background of this case in the brief we filed at the petition stage. Only one additional factual matter requires mention here. In their brief in opposition (at 17-18), the Vanguards argued that the record does not contain any collective bargaining agreement between the union and the city. If the Vanguards meant to suggest that there was no such agreement, they are wrong. There was a memorandum of understanding between the union and the city governing seniority and promotions. Under that memo-

random and the civil service rules, as Judge Kennedy noted in dissent (Pet. App. A22), "promotions were based on a combination of factors that included seniority and examination scores." It seems fair to assume that the absence of the collective bargaining agreement from the record is due to the improper procedures followed by the district court, *i.e.*, the entry of a judgment without a proper adjudication and over the objection of one of the parties (petitioner, which intervened of right).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns the legality under Section 706(g) of Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(g))[1] of a so-called "consent" decree that provided preferences in promotions in the Cleveland Fire

[1] The Vanguards asserted in their brief in opposition (at 14-17) that the "consent" decree in this case rests upon the Fourteenth Amendment as well as Title VII. The court of appeals, however, did not rely upon the Fourteenth Amendment in affirming the decree, and thus the constitutional issue need not be reached by this Court. See *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 163-164 (1975); *Ramsey* v. *Mine Workers*, 401 U.S. 302, 312 (1971); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Moreover, it is uncertain whether *intentional* discrimination, a necessary prerequisite to relief under the Constitution, was either found or admitted in this case. *Washington* v. *Davis*, 426 U.S. 229 (1976); see *Firefighters Local Union No. 1784* v. *Stotts*, No. 82-206 (June 12, 1984), slip op. 19 n.16. The consent decree merely stipulated that there had been past "discrimination" in the fire department (see Pet. App. A29-30). Since promotions in the relevant past were based exclusively on written examinations and other facially neutral objective criteria, it seems likely that the "discrimination" referred to was the *disparate impact* type. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). In any event, this question should not be resolved in this Court in the first instance. The Vanguards' argument also ignores the principle (see pages 6-7, *infra*) that equitable remedies must be tailored to fit the scope of the constitutional violation they are imposed to correct. Indeed, as we have argued this Term in our brief in *Wygant* v. *Jackson Board of Education*, No. 84-1340, the Fourteenth Amendment does not permit a public employer to award racial or ethnic preferences to non-victims. We are serving a copy of our brief in *Wygant* upon the parties in this case.

Department to individuals not shown to be the actual victims of discrimination.[2] This decree was entered with

[2] In their brief in opposition (at 19-20), the Vanguards asserted that all of the individuals given preference under the "consent" decree were in fact actual victims of past discrimination by the Fire Department. The decree provides for racial and ethnic preferences in promotions beginning in February 1983 and continuing until December 1987. The Vanguards' argument is that every minority employee who has received or will receive such a preference is an actual victim of discrimination because he or she is likely to have been a member of the Fire Department prior to entry of the consent decree. This contention has no substance.

Although petitioner argued below that preferential relief is required to be victim-specific, the lower courts did not inquire whether the beneficiaries of the quotas were victims of past discrimination. To the contrary, the lower courts upheld the quota relief on the ground that victim-specificity was not required. Thus, if this Court holds that the lower courts' analysis of this legal question was erroneous, the Vanguards should be required to substantiate their new victim-specific claim in the district court on remand.

Moreover, it seems apparent from the face of the decree that the beneficiaries of the quotas are not necessarily victims of past promotional discrimination by the Department. Contrary to the Vanguards' assumption, the fact that a particular minority employee was on the workforce at the time the decree was entered provides no basis for assuming that that person would have received a promotion but for discrimination. As Judge Kennedy correctly noted below, "[m]any of the minority firefighters affected by the decree had never been eligible for promotion before the decree was entered, and thus could not have been the victims of discrimination in promotions" (Pet. App. A27). For example, since the decree requires a minimum of three years' service in the Department's lower ranks for promotion to lieutenant, only those minority firefighters hired by 1978 were eligible for promotion at the time of the last allegedly discriminatory act (the 1981 promotion exam). But by 1987, when the decree expires, many minority employees who joined the force after 1978 will have completed the time needed for promotion to lieutenant and thus will benefit from the racial and ethnic preferences awarded by the decree. Indeed, minority employees who joined the Department in 1984—*after the decree was adopted*—will be eligible for preferential quota promotions in 1987. Furthermore, although the 1981 exam has been alleged to be discriminatory, the last examination *from which promotions were made*—and thus the primary, if not exclusive, cause of whatever discrimination occurred—was given in 1978 and thus could have

the consent of the employer and the minority employees who initiated the suit but over the strenuous objection of the union, which intervened of right to protect the interests of its members. This decree is unlawful.

Section 706(g)—the sole provision of Title VII governing judicial remedies—authorizes a wide range of affirmative equitable relief to make whole those individuals subjected to employment discrimination. But the final sentence of Section 706(g) states in language that could hardly be clearer that "[n]o order of the court" shall grant such relief to an individual who "was refused employment or advancement or was suspended or discharged for any reason other than discrimination." The plain meaning of this provision is that a court may not enter an order imposing a quota, because a quota awards benefits solely on the basis of race or ethnicity rather than the individual's status as a victim of discrimination.

The legislative history of Section 706(g) unmistakably shows that it was intended to preclude the imposition of quotas by Title VII courts. Both in the House and the Senate, the chief proponents and supporters of the 1964 Civil Rights Act made this point repeatedly. Section 706(g) was slightly amended in 1972, but it is quite clear that this amendment was not intended to authorize the imposition of quotas.

This Court's prior decisions construing Section 706(g)—most notably, *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976); *Teamsters* v. *United States*, 431 U.S. 324 (1977); and *Firefighters Local Union No. 1784* v. *Stotts*, No. 82-206 (June 12, 1984)—have recognized that "the policy behind [Section] 706(g) * * * is to provide make-whole relief only to those who have been

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adversely affected only those quota beneficiaries who were on the force years earlier.

The Vanguards also seem to argue that every minority individual who took the test for promotion in November 1981 was an actual victim (Br. in Opp. 19-20). Again, this is not possible, because the district court impounded the 1981 test results before they were used (see Pet. App. A33).

actual victims of illegal discrimination" (slip op. 16-17). This policy, moreover, is not limited to cases involving seniority rights. Section 706(g) by its terms applies to all court-ordered remedies. Another provision of Title VII—Section 703(h), 42 U.S.C. 2000e-2(h)—expresses a strong policy in favor of protection of bona fide seniority rights, but Section 703(h) is exclusively concerned with liability and consequently provides no basis for narrowing the remedial principle contained in Section 706(g).

Similarly, Section 706(g) is not restricted to litigated decrees but applies with equal force to consent decrees. The language of Section 706(g) states without qualification that "[n]o order of the court" shall impose quota relief. There is no doubt that a consent judgment is a court order. Moreover, there are strong reasons for insisting that this remedial principle be honored in consent decrees because the rights of innocent nonminority employees may be sacrificed. In the present case, the abridgment of the rights of non-minority employees was particularly striking, because here the union representing all of the employees intervened of right, only to have the so-called "consent" decree entered over its objection. This was a flagrant violation of due process, for it is firmly established that a party cannot be bound to a consent decree unless that party in fact consents.

Recognition that Section 706(g) applies to consent decrees will not frustrate the settlement of Title VII suits. Techniques routinely applied in settling other types of class actions will permit the settlement of Title VII suits on terms that fully respect Section 706(g) but do not require a concession of discrimination by the defendant. Instead, the settling parties can reach agreement regarding the allegedly discriminatory practices upon which the settlement is to be based. They can then assess (or agree that an arbitrator or magistrate will assess) the effect of those practices on individual class members. In recent years, the government has entered into numerous Title VII consent decrees that adhere to Section 706(g)'s remedial principle.

ARGUMENT

THE "CONSENT" JUDGMENT IN THE PRESENT CASE IS UNLAWFUL BECAUSE IT VIOLATES THE REMEDIAL PRINCIPLE EXPRESSED IN SECTION 706(g) OF TITLE VII AND WAS ENTERED OVER THE OBJECTION OF AN INTERVENOR OF RIGHT WHOSE MEMBERS WERE ADVERSELY AFFECTED

A. It Is A General Principle Of Equity Jurisprudence That A Court's Remedial Authority Extends Only As Far As Necessary To Remedy The Violation Of Law

Section 706(g) of Title VII, as we will show (see pages 7-14, *infra*), specifically limits relief to those who have been actual victims of discrimination. This remedial limitation, carefully spelled out by Congress, accords with the established principle of equity jurisprudence that courts are "required to tailor 'the scope of the remedy' to fit 'the nature and extent of the *** violation.'" *Hills* v. *Gautreaux*, 425 U.S. 284, 293-294 (1976), quoting *Milliken* v. *Bradley* (*Milliken I*), 418 U.S. 717, 744 (1974). Accord, *e.g.*, *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971). This means, the Court has explained, that the remedial powers of a federal court can "be exercised only on the basis of a violation of the law and [can] extend no farther than required by the nature and the extent of that violation." *General Building Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 399 (1982).

The Court has applied these "fundamental limitations on the remedial powers of the federal courts" (*ibid.*) in cases involving claims of unlawful racial discrimination. For example, in *Milliken I*, in striking down a school desegregation remedy that extended beyond the jurisdiction in which discrimination had been found, the Court wrote (418 U.S. at 746 (emphasis added)):

> [A desegregation] remedy is necessarily designed, *as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.* Disparate

> treatment of white and Negro students occurred within the Detroit school system, and not elsewhere, and on this record the remedy must be limited to that system.

See also, *e.g.*, *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 420 (1977); *Milliken* v. *Bradley* (*Milliken II*), 433 U.S. 267, 280, 282 (1977); *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976).

B. Congress Adopted This Remedial Principle When It Enacted Title VII

1. When Congress adopted Title VII, it unequivocally incorporated the fundamental equitable principle that remedies must correct the violation but may not exceed its scope. By its terms, Title VII protects the personal right of each individual to be free from employment discrimination.[5] Title VII "precludes treatment of individuals as simply components of a racial * * * class" and, thus, "requires that [courts] focus on fairness to individuals rather than fairness to classes." *Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 708, 709 (1978). Accord, *Arizona Governing Committee* v. *Norris*, 463 U.S. 1073, 1080 (1983) (opinion of Marshall, J.); *id.* at 1103 (opinion of Powell, J.); *id.* at 1108 (O'Connor, J., concurring); *Connecticut* v. *Teal*, 457 U.S. 440, 453-454 (1982) ("The principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole.").

The section of Title VII governing judicial remedies—Section 706(g)—similarly focuses on the rights of individuals. The first sentence of Section 706(g) authorizes a broad range of affirmative relief to remedy discrimination, including "reinstatement or hiring of employees, with or without back pay * * * or any other equitable

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[5] Section 703(a)(1) makes it unlawful for an employer "to fail or refuse to hire or to discharge *any individual*, or otherwise to discriminate against *any individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* race." 42 U.S.C. 2000e-2(a)(1) (emphasis added).

relief as the court deems appropriate."[4] But the final sentence of Section 706(g) provides:

> No order of the court shall require * * * the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual * * * was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin * * *.

The plain meaning of these provisions is that a court, upon finding that an employer has engaged in unlawful employment discrimination, may order such affirmative relief as is necessary to make victims whole but may not award relief to individuals whose rights under Title VII were not violated.[5] A quota remedy, which inevitably provides employment preferences to individuals who were not "refused employment or * * * suspended or discharged" as a result of discrimination by the employer violates this provision.

[4] The phrase "any other equitable relief as the court deems appropriate" was added in 1972. For its meaning, see pages 11-12, *infra*.

[5] The wording of Section 706(g) was based on Section 10(c) of the National Labor Relations Act, 29 U.S.C. 160(c), which directs the Labor Board, on finding an unfair labor practice, to order "affirmative action including reinstatement of employees with or without back pay." Decisions interpreting this provision of the NLRA have therefore been recognized as reliable guides to the intended meaning of Section 706(g). See, *e.g.*, *Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 226 n.8 (1982).

Decisions construing Section 10(c) make clear that "the thrust of 'affirmative action' redressing the wrong incurred by an unfair labor practice is to make 'the employees whole, and thus restore[e] the economic status quo that would have obtained but for the company's wrongful [act].'" *Franks* v. *Bowman Transportation Co.*, 424 U.S. at 769, quoting *NLRB* v. *Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969). Indeed, by 1964 it was well settled that the Labor Board's authority under Section 10(c) to order affirmative action is remedial only and thus limited to those measures necessary to make whole "the victims of discrimination." See, *e.g.*, *Carpenters Local* v. *NLRB*, 365 U.S. 651, 655-656 (1961); *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194, 197-198 (1941); *Republic Steel Corp.* v. *NLRB*, 311 U.S. 7, 9-10 (1940). See also Comment, *Preferential Relief Under Title VII*, 65 Va. L. Rev. 729, 747 (1979).

2. a. The legislative history unmistakably supports this interpretation of Section 706(g). In introducing in the House the bill that ultimately became the 1964 Civil Rights Act, Representative Celler, floor manager of the bill and a principal draftsman of Section 706(g) (see 110 Cong. Rec. 2567 (1964) (Rep. Celler)), expressly responded to the charge that federal courts and agencies would order quotas and other forms of preferential treatment under Title VII. Noting that a court order could be entered only on proof "that the particular employer involved had in fact, discriminated against one or more of his employees because of race," Representative Celler emphasized that "[e]ven then the court could not order that any preference be given to any particular race * * *, but would be limited to ordering an end to discrimination." 110 Cong. Rec. 1518 (1964). Representative Celler's understanding of Title VII was repeated by other supporters during the House debate.[6]

Supporters of Title VII in the Senate took a similar view. Senator Humphrey, the Democratic floor manager, stated that "nothing in the bill would permit any official *or court* to require any employer or labor union to give preferential treatment to any minority group." 110 Cong. Rec. 5423 (1964) (emphasis added). In an interpretive memorandum often cited by this Court as an "authoritative indicator" of the meaning of Title VII (see, *e.g.*, *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 73 (1982)), Senators Clark and Case, the bipartisan floor

[6] See 110 Cong. Rec. 1540 (1964) (Rep. Lindsay) (Title VII "does not impose quotas *or any special privileges.*"); *id.* at 1600 (Rep. Minish). Similarly, an interpretive memorandum prepared by the Republican Members of the House Judiciary Committee defined the scope of permissible judicial remedies under Title VII as follows (*id.* at 6566 (emphasis added)): "[A] Federal court may enjoin an employer * * * from practicing further discrimination and may order the hiring *or reinstatement of an employee* * * *. But, [T]itle VII *does not permit the ordering of racial quotas* in businesses or unions."

"captains" responsible for explaining Title VII, provided a detailed description of the intended meaning of Section 706(g). After observing that a "court could order appropriate affirmative relief," Senators Clark and Case stressed (110 Cong. Rec. 7214 (1964) (emphasis added)):

> No court can require hiring, reinstatement, admission to membership, or payment of back pay for anyone *who was not discriminated against in violation of this title*. This is stated expressly in the last sentence of section 707(e) [enacted, without relevant change, as Section 706(g)], which makes clear what is implicit throughout the whole title; that employers may hire and fire, promote and refuse to promote for any reason, good or bad, provided only that individuals may not be discriminated against because of race, color, religion, sex, or national origin.

This point was restated, in virtually identical language, by Senator Humphrey. See *id.* at 6549. And to dispel all doubt on this score, Senator Humphrey went on to address the claims of opponents regarding quota remedies (*ibid.*):

> Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power * * * to any court to require hiring, firing, or promotion of employees in order to meet a racial "quota" or to achieve a certain racial balance.

Other key supporters of the bill were equally clear in their understanding that Title VII's remedial provisions would not permit judicial imposition of racial preferences.[7] Indeed, every Representative and every Senator

[7] Senator Kuchel, Republican floor leader of the bill, addressed the issue squarely (110 Cong. Rec. 6563 (1964) (emphasis added)):

> If the court finds that unlawful employment practices have indeed been committed as charged, then the court may enjoin the responsible party from engaging in such practices and shall order the party to take that affirmative action, such as the reinstatement or hiring of employees, with or without back pay, which may be appropriate.
>
> * * * * *
>
> *But the important point*, in response to the scare charges which have been widely circulated to local unions throughout America, *is that the court cannot order preferential hiring or promotion consideration for any particular race, religion, or other group.* Its power is solely limited to ordering an end to the discrimination which is in fact occurring.

Similarly, Senator Clark inserted into the Congressional Record a memorandum prepared by the Justice Department expressly denying that a violation of Title VII could be remedied by quota relief. The memorandum stated (110 Cong. Rec. at 7207 (1964) (emphasis added)): "There is no provision either in Title VII or in any other part of this bill, that requires *or authorizes* any Federal agency *or Federal court* to require preferential treatment for any individual or any group for the purpose of achieving racial balance".

Throughout the Senate debate, the principal Senate sponsors prepared and delivered a daily Bipartisan Civil Rights Newsletter to supporters of the bill. The issue of the Newsletter published two days after the opponents' filibuster had begun declared: "Under title VII, *not even a court*, much less the Commission, *could order racial quotas* or the hiring, reinstatement, admission to membership or payment of back pay *for anyone who is not discriminated against in violation of this title*." 110 Cong. Rec. at 14465 (1964) (emphasis added).

[8] See Comment, *supra*, 65 Va. L. Rev. at 738.

[9] The language added in 1972 had its origin in an amendment introduced by Senator Dominick, who opposed a provision in the Labor Committee bill to confer "cease and desist" authority on the EEOC; the committee bill proposed to make no change in either

to address the issue decried the use of quota remedies; and the drafters, sponsors, and supporters of Title VII uniformly and unequivocally assured their colleagues that racial quotas and other forms of class-based preferential treatment could not be imposed by courts.[8]

b. This clear congressional intention was not reversed when Congress amended Title VII in 1972. The only arguably relevant change in Section 706(g) was the addition of language making clear that discriminatees may be awarded not only the specific types of relief expressly mentioned in the section, but also "any other equitable relief as the court deems appropriate."[9] The Section-by-

Section analysis of the conference bill made clear, however, that this addition to the first sentence of Section 706(g) was not meant to expand judicial remedial authority beyond traditional limits. Prepared by Senator Williams, the Senate manager of the legislation, the Section-by-Section Analysis explained that "the scope of relief under [Section 706(g)] is intended to make *the victims of unlawful discrimination whole*, * * * [which] requires that *persons aggrieved* by the consequences and effects of the unlawful employment practice *be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.*" 118 Cong. Rec. 7168 (1972) (emphasis added) (Senate); *id.* at 7565 (House).

Some courts seeking justification for the imposition of quota relief have relied on the Senate's refusal in 1972 to adopt two amendments offered by Senator Ervin to prohibit federal agencies from imposing quotas. See, *e.g.*, *United States* v. *Int'l Union of Elevator Constr.*, 538 F.2d 1012, 1019-1020 (3d Cir. 1976). This argument is doubly flawed. First, it ignores elementary constitutional principles. A law (such as the final sentence of Section 706(g)) can be amended or repealed only by the subsequent enactment of another law; it cannot be changed by Congress's failure to pass a bill. See *INS* v. *Chadha*, 462 U.S. 919, 954 (1983) ("Amendment and repeal of statutes, no less than enactment, must conform with Art. I."). Second, the Senate's rejection of Senator Ervin's amendments is not even convincing evidence of Congress's attitude in 1972 toward court-ordered quotas. Congress's failure to enact proposed legislation does not

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Section 703 or Section 706(g). Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., *Legislative History of the Equal Employment Opportunity Act of 1972*, at 553-558, 676-678 (Comm. Print 1972) [hereinafter cited as *Leg. Hist.*]. Senator Dominick's filibuster of the committee bill ended with adoption of his amendment, which denied the EEOC independent enforcement authority but granted it power to institute lawsuits in federal court. The purpose of the language added to the first sentence of Section 706(g) was not explained, or even discussed, by Senator Dominick or anyone else during the debate.

necessarily signify disapproval of its provisions. See, *e.g.*, *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235, 241 (1970); *Girouard* v. *United States*, 328 U.S. 61, 69 (1946); Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 Ind. L.J. 515, 530-531 (1982). A bill may be voted down because of form, timing, draftsmanship, the belief that it merely duplicates existing law, the desire for further study or reflection, the identity or party of the sponsor, disagreement with some but not all of its terms, or many other reasons. Moreover, it is clear from the language of the amendments (118 Cong. Rec. 1662, 4917 (1972)) and from their sponsor's explanation (*id.* at 1663-1664, 4917-4918) that the amendments had nothing to do with the remedial authority of courts but were instead concerned solely with the conduct of federal agencies, particularly the Office of Federal Contract Compliance.[10] And finally, whatever the

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[10] Senator Ervin's first amendment, one of many that he offered during a filibuster, would have prohibited any "department, agency, or officer of the United States" from requiring employers to practice "discrimination in reverse." *Leg. Hist.* 1017. Senator Ervin's principal target was the Office of Federal Contract Compliance's Philadelphia Plan, which he termed "[t]he most notorious example of discrimination in reverse." *Id.* at 1043. The amendment was necessary, he said, because officials of the OFCC and EEOC "could not understand the plain and the unambiguous words of Congress" in Section 703(j). *Leg. Hist.* 1042. As he explained, the amendment would merely have extended to all federal executive agencies, particularly the OFCC, Section 703(j)'s prohibition against requiring employers to engage in racially preferential hiring to rectify racial imbalance in their work forces. This Court has recognized (*United Steelworkers* v. *Weber*, 443 U.S. 193, 205 n.5 (1979)), that Section 703(j) speaks only to substantive liability under Title VII, not to the scope of judicial remedial authority, which is governed solely by Section 706(g). Thus, notwithstanding the contrary statements of Senators Javits and Williams, who spoke against the amendment (see *Leg. Hist.* 1046-1048, 1070-1073), it is clear that Senator Ervin's amendment did not seek to alter Section 706(g) and was not concerned with the remedial authority of courts.

Senator Ervin's second amendment makes this intent even clearer. That amendment would have simply amended Section 703(j) to

view of the Senate in 1972, the House expressed continued and unmistakable opposition to quota relief."

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extend its coverage to executive orders and statutes other than Title VII. *Leg. Hist.* 1714.

" The history of the 1972 amendments began in the House, where Representative Hawkins introduced a bill designed, among other things, to give the EEOC "cease and desist" powers and to transfer the administration of Executive Order 11246 from the Labor Department's Office of Federal Contract Compliance (OFCC) to the EEOC. H.R. Rep. 92-238, 92d Cong., 1st Sess. 1 (1972). Because the OFCC had imposed quotas in its enforcement of the executive order, many congressmen feared that the bill would confer on the EEOC authority to order employment quotas.

Before debate commenced, Representative Dent, the bill's floor manager, proposed an amendment that "would forbid the EEOC from imposing any quotas or preferential treatment of any employees in its administration of the Federal contract-compliance program." *Leg. Hist.* 190. The amendment did not address the remedial power of courts under Title VII because, according to Representative Dent, "[s]uch a prohibition against the imposition of quotas or preferential treatment already applies to actions brought under title VII" (*ibid.*). During the ensuing debate, Representative Hawkins stated: some say that this bill seeks to establish quotas * * *. Title VII prohibit[s] this * * *." *Id.* at 204. Hawkins then acknowledged his support for the Dent amendment, reiterating that Title VII already prohibited the establishment of quotas. *Id.* at 208-209.

It is also noteworthy that the 1972 Congress refused to delete the final sentence from Section 706(g), which, as previously discussed (pages 7-11, *supra*), makes clear that a court's affirmative equitable powers to remedy a violation extend no further than is necessary to make victims whole. The House and the Senate passed two differing versions of Section 706(g) in 1972. The House bill (H.R. 1746, 92d Cong., 1st Sess. (1972)) left the 1964 provision largely unchanged, except for the addition of a provision limiting back pay awards. See *Leg. Hist.* 331-332. The bill that passed the Senate (S. 2515, 92d Cong., 2d Sess. (1972)), however, eliminated from Section 706(g) the final sentence contained in the 1964 Act. See *Leg. Hist.* 1783. The bill that ultimately became law emerged from the House-Senate conference with the original final sentence of Section 706(g) restored. S. Conf. Rep. 92-681, 92d Cong., 2d Sess. 5-6, 18-19 (1972); H.R. Conf. Rep. 92-899, 92d Cong., 2d Sess. 5-6, 18-19 (1972).

C. This Court's Prior Decisions Have Recognized That Title VII Relief May Be Given Only To The Actual Victims Of Discrimination

This Court's decisions have recognized that Title VII relief may be awarded only to make whole the actual victims of discrimination. In *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), the Court held that it was appropriate under Section 706(g) to grant retroactive seniority to individuals whom the employer had discriminatorily refused to hire at an earlier date. The Court observed (424 U.S. at 764 (emphasis added; citation omitted)) that Title VII "'is intended *to make the victims of unlawful employment discrimination whole*'" and that "'the attainment of this objective * * * requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, *restored to a position where they would have been were it not for the unlawful discrimination.*'"

This remedial principle was applied in *Teamsters* v. *United States*, 431 U.S. 324 (1977). After affirming the lower courts' findings that the employer had engaged in a pattern or practice of excluding blacks and Hispanics from desirable positions as over-the-road (OTR) truck drivers (*id.* at 334-343), the Court considered what remedy was appropriate under Section 706(g). The Court rejected the company's argument that retroactive seniority should be restricted to those individuals who had actually applied for OTR positions (431 U.S. at 362-371). Instead, the Court held (*id.* at 363-368) that individual nonapplicants should be allowed to prove that they were qualified for an OTR position but were deterred from applying because of the company's discrimination. The Court likewise rejected the contention that all nonapplicants should be regarded as presumptive victims (*id.* at 363, 367-373). "A nonapplicant," the Court stated (*id.* at 367), "must show that he was a potential victim of unlawful discrimination." The Court then explained "[t]he task remaining for the District Court on remand" (*id.* at 371-372 (emphasis added)):

> Initially, the court will have to make a substantial number of individual determinations in deciding *which of the minority employees were actual victims* of the company's discriminatory practices. After the victims have been identified, the court must, as nearly as possible, "'*recreate the conditions and relationships that would have been had there been no*'" *unlawful discrimination*. *Franks*, 424 U.S., at 769.[16]

Most recently, in *Firefighters Local Union No. 1784 v. Stotts*, No. 82-206 (June 12, 1984), this Court clearly reiterated that Title VII relief is restricted to the actual victims of discrimination. In *Stotts*, the district court modified a Title VII consent decree over the objection of the employer, the City of Memphis. This modification prohibited the city from following its seniority system in determining who must be laid off insofar as application of that system would decrease the proportion of black employees. As a result, some "non-minority employees with more seniority than minority employees were laid off or demoted in rank" (slip op. 4). The court of appeals approved the district court's modification (*id.* at 4-5).

This Court reversed. After first holding (*Stotts*, 10-12) that the modification went beyond merely enforcing the agreement of the parties as reflected in the consent decree, the Court concluded (*id.* at 11-20) that the layoff quota was a type of relief "that could not have been ordered had the case gone to trial and the plaintiffs proved that a pattern or practice of discrimination existed" (*id.* at 16). Expressly reaffirming its ruling in *Franks* and *Teamsters* that the policy underlying Section 706(g) "is to provide make-whole relief only to those who have been actual victims of illegal discrimination" (*Stotts*, slip op. 16-17), the Court held that it was

[16] Similarly, in *Ford Motor Co. v. EEOC*, 458 U.S. at 234 (citation omitted), the Court rejected an interpretation of Title VII that "would not merely restore [the alleged discriminatee] to the 'position where they would have been were it not for the unlawful discrimination' * * * it would catapult them into a better position than they would have enjoyed in the absence of discrimination."

improper under Section 706(g) for the district court to award protection against layoffs to individuals simply because of their membership in the disadvantaged class (slip op. 15-20). The Court also canvassed and relied upon the legislative history that we have set out at somewhat greater length in this brief (*id.* at 16-18).

2. The courts of appeals have not heeded what we believe is the clear meaning of this Court's decision in *Stotts* but have instead constructed numerous arguments that seek to distinguish and limit *Stotts*. The two grounds upon which the court of appeals in this case relied have been employed most frequently. First, the court below held that *Stotts* does not apply to consent decrees.[17] We will discuss this question below (see pages 19-27, *infra*). In addition, the court of appeals held that *Stotts* applies only when seniority rights are abridged.[18] As Judge Kennedy noted in dissent below, seniority rights were infringed in the present case (Pet. App. A22). In any event, this basis for distinguishing *Stotts* is legally unsound. The pivotal issue in *Stotts* was the type of relief that a court may award in a Title VII suit. Section 706(g) is the sole provision of Title VII defining the remedies that a court may order upon finding a violation of the statute, and as the Court stated in *Stotts*, Section 706(g) empowers federal courts in Title VII cases "to provide make-whole relief *only* to those who have been actual victims of illegal discrimination." *Stotts*, slip op. 16-17 (emphasis added).

[17] Pet. App. A15-A20; see also *Paradise v. Prescott*, 767 F.2d 1514, 1529 (11th Cir. 1985); *Devereaux v. Geary*, 765 F.2d 268, 273 (1st Cir. 1985), petition for cert. pending, No. 85-692; *Turner v. Orr*, 759 F.2d 817, 824 (11th Cir. 1985), petition for cert. pending, No. 85-171.

[18] Pet. App. A13; see also *Turner v. Orr*, 759 F.2d at 824; *EEOC v. Local 638*, 753 F.2d 1172, 1186 (2d Cir. 1985), cert. granted, No. 84-1656 (Oct. 7, 1985); *Diaz v. AT&T*, 752 F.2d 1356, 1360 n.5 (9th Cir. 1985) (dicta); *Van Aken v. Young*, 750 F.2d 43, 45 (6th Cir. 1984) (dicta); *Kromnick v. School District*, 739 F.2d 894, 911 (3d Cir. 1984), cert. denied, No. 84-1695 (Jan. 7, 1985) (dicta); *Green v. City of Madison*, 738 F.2d 786, 795 n.5 (7th Cir. 1984), cert. denied, No. 84-394 (Oct. 15, 1984) (dicta).

In limiting *Stotts* to relief infringing seniority rights, the courts of appeals have pointed to *Stotts'* discussion of Section 703(h), which provides that it is not unlawful for an employer to abide by a bona fide seniority system. See Pet. App. A14; *Turner* v. *Orr*, 759 F.2d 817, 824 (11th Cir. 1985), petition for cert. pending No. 85-177; *Kromnick* v. *School District*, 739 F.2d 894, 911 (3d Cir. 1984), cert. denied, No. 84-606 (Jan. 7, 1985). But as this Court expressly held in *Franks* (424 U.S. at 758), Section 703(h) merely "delineates which employment practices are illegal * * * and which are not"; it does not "proscribe relief otherwise appropriate under the remedial provisions of Title VII, § 706(g), * * * where an illegal discriminatory act or practice is found."

Both the majority and dissenting opinions in *Stotts* reflect this understanding of the meaning of Sections 703(h) and 706(g). The majority discussed Section 703(h) in connection with the question whether the seniority system was bona fide (*Stotts*, slip op. 13-14), but the portion of the majority opinion devoted to the type of relief allowed under Title VII (slip op. 14-20) repeatedly referred to Section 706(g) and made only one passing reference in a footnote to Section 703(h).[11] Similarly, the relevant portion of the dissenting opinion (slip op. 19-29) extensively discussed Section 706(g), while making no reference to Section 703(h).[12]

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[11] See *Stotts*, slip op. 20 n.17. The Court referred to "statutory policy * * * here, §§ 703(h) and 706(g) of Title VII."

[12] While the relevant portion of the majority opinion in *Stotts* did rely significantly on *Franks* and *Teamsters*—cases involving both Sections 706(g) and 703(h)—it seems clear that the majority was referring solely to the portions of those decisions concerning the remedial question governed by Section 706(g). In *Teamsters*, Part II of the opinion of the Court (431 U.S. at 334-356) discussed the legality of the conduct of the employer and the union, as well as the validity of the seniority system. It was in this portion of the opinion that Section 703(h) was discussed. Part III of the opinion (431 U.S. at 356-377), which discussed the remedial question, made no reference to Section 703(h), but instead made repeated references (431 U.S. at 359, 362, 364, 366, 372) to the sections of *Franks* concerning Section 706(g) (see 424 U.S. at 762-779). The *Stotts* majority cited only Part III of *Teamsters* (*Stotts*, slip op. 16, citing 431 U.S. at 367-371, 371-376).

[13] Indeed, the court below itself acknowledged (Pet. App. A20 n.10): "To be sure, a consent decree is a judicial order."

D. Section 706(g) Applies To Consent Judgments As Well As To Litigated Decrees

1. If we are correct that Section 706(g) prohibits quota relief, the only remaining question that needs to be decided in this case is a simple one: Is a consent judgment a court order within the meaning of Section 706(g)? As previously noted, the final sentence of Section 706(g) provides (emphasis added):

> *No order of the court* shall require * * * the hiring, reinstatement, *or* promotion of an individual as an employee * * * if such individual * * * was refused employment *or* advancement * * * for any reason other than discrimination on account of race * * *.

Thus, if a consent decree is a court order within the meaning of this provision, such a decree, no less than a judgment entered in a litigated case, must comply with Section 706(g).

That a consent decree is a court order seems almost too obvious to require discussion. This Court has affirmed that "[a] judgment upon consent is 'a judicial act.'"[13] *Pope* v. *United States*, 323 U.S. 1, 12 (1944) (citation omitted); accord, *United States* v. *Swift & Co.*, 286 U.S. 106, 114-115 (1932). A consent decree is signed and entered by the court. It is treated like any other final judgment for purposes of appeal. See *Stotts*, slip op. 2 (Stevens, J., concurring); *Carson* v. *American Brands, Inc.*, 450 U.S. 79 (1981). Indeed, the court of appeals in the present case, in holding that the consent judgment was appealable, acknowledged (Pet. App. A9): "A consent decree, although founded on an agreement of the parties, is a final judgment." A consent decree also has the same binding effect as any other judgment and thus enjoys a status far different from a mere contract. As Judge

Kennedy explained in dissent below (Pet. App. A26), non-compliance with a consent decree is punishable by contempt. See also *SEC* v. *Randolph*, 736 F.2d 525, 528 (9th Cir. 1984). In addition, the "consent" decree in this case contains a provision superseding the constitution, statutes, and regulations of the State of Ohio, as well as all conflicting local laws (Pet. App. A37). Only a judgment whose force derives from federal law can have such preemptive effect.

Although several courts have held that *Stotts* does not apply to consent decrees (*see* page 17, *supra*), only the court of appeals in the present case ventured to explain the basis for the distinction. That court appeared to advance three arguments, but none is sound.

The court's first argument was a play on the word "require" in Section 706(g). Section 706(g), as noted, provides (emphasis added) that "[n]o order of the court shall *require*" the "hiring, reinstatement, or promotion" of an employee pursuant to a quota. The court of appeals suggested (Pet. App. A15-A16) that Section 706(g) does not apply to a consent decree because an employer is not required to enter into the decree. But Section 706(g) is not concerned with protecting an employer from being "require[d]" to enter into a consent decree; the Due Process Clause does that. Rather, Section 706(g) prohibits the entry of a court order that requires the implementation of quotas. This prohibition plainly applies to consent decrees, as well as litigated decrees, because once a consent decree is entered the order and the enforcement power of the court require the parties to abide by the decree's terms.

Second, the court of appeals contended (Pet. App. A17) that if a consent decree cannot award quota relief, then "*Stotts* sub silentio overruled [*United Steelworkers* v. *Weber*, 443 U.S. 193 (1979)]." This argument confuses the question of what relief a court may order (the question governed by Section 706(g)) with the question of what an employer may do in a collective bargaining agreement or other private undertaking (the question

addressed in *Weber*). Clearly the *Weber* Court viewed these as very different questions, for in holding that racial preferences in a collective bargaining agreement are not always prohibited by Title VII, the Court saw no need to grapple with Section 706(g), which by its terms applies to court orders, not to negotiated union contracts.[18]

Finally, the court of appeals relied (Pet. App. A18) upon the broad proposition that generally a consent decree may "provide[] relief beyond that authorized in the underlying statute." But whatever the validity of this argument, it does not apply here. Regardless of whether a consent decree can go beyond the remedy that a statute *authorizes*, it certainly cannot grant relief that a statute expressly *forbids*.[19] Thus, there is no need to confront larger issues regarding the permissible scope of relief in consent decrees entered pursuant to statutes that do not include explicit limitations on courts' remedial authority. If such issues are addressed, however, we believe that, under *System Federation No. 91* v. *Wright*, 364 U.S. 642 (1961), a consent decree must not only obey express statutory prohibitions such as Section 706(g) but must also conform "with statutory objectives" (364 U.S. at 651).

In *System Federation*, employees had brought suit some years earlier under a provision of the Railway Labor Act prohibiting discrimination by employers against non-union employees, and the defendants—a railroad company and several unions—had agreed to a consent decree

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[18] *Weber* dismissed Section 706(g) in a footnote as a provision concerned with remedies. 443 U.S. at 205 n.5.

[19] Judicial entry of a Title VII consent decree granting preferences to nonvictims is no different in principle from the entry of a consent decree contravening any other congressionally imposed limitation on statutory relief. For example, a provision of the Norris-LaGuardia Act, 29 U.S.C. 104, prohibits federal courts from issuing certain injunctive relief in labor disputes. It seems clear that the parties to a lawsuit brought under the Norris-LaGuardia Act cannot by their consent grant to a federal court remedial power to issue an injunction exceeding the restrictions statutorily imposed by Congress.

forbidding such discrimination. The statute subsequently was amended to permit union shops, and a union moved to modify the decree to reflect this amendment. The lower courts denied the motion, reasoning that since non-union shops remained legal, the parties' agreement could be enforced.

*This Court reversed, holding that to fail to modify the decree "would be to render protection in no way authorized by the needs of safeguarding statutory rights" (364 U.S. at 648). The Court explained that the parties' agreement and consideration were not enough to sustain the decree because "it was the Railway Labor Act, and only incidentally the parties, that the District Court served in entering the consent decree now before us. * * *. The parties have no power to require of the court continuing enforcement of rights the statute no longer gives" (id. at 651-652). The Court concluded (id. at 652-653): "The type of decree the parties bargained for is the same as the only type of decree a court can properly grant—one with all those strengths and infirmities of any litigated decree * * * [The court was not acting to enforce a promise but to enforce a statute."*

The Stotts decision reaffirmed this principle, stating (slip op. 13 n.9):

> *"[T]he District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce," not from the parties' consent to the decree. System Federation No. 91 v. Wright, 364 U.S. 642, 651 (1961).*[20]

From the principle recognized in System Federation and reaffirmed in Stotts it follows, we believe, that a

[20] In *Stotts*, both the three dissenting Justices and Justice Stevens, in concurrence, interpreted the majority opinion as saying that a consent decree cannot provide relief that would be unavailable after trial. See slip op. 29 n.9 (Blackmun, J., dissenting) ("The Court's analysis seems to be premised on the view that a consent decree cannot provide relief that could not be obtained at trial."); id. at 2 n.3 (Stevens, J., concurring) ("The Court seems to suggest that a consent decree cannot authorize anything that would not constitute permissible relief under Title VII.").

Title VII consent decree must conform to the policy of Section 706(g), which is "to provide make-whole relief *only* to those who have been actual victims of illegal discrimination" (*Stotts*, slip op. 16-17 (emphasis added)). This is precisely what we understand this Court to have meant in *Stotts* when it stated that awarding preferences to nonvictims would be "inconsistent with" Title VII (slip op. 13 n.9) and "counter to statutory policy" (id. at 20 n. 17). And in the case of Title VII, it is not only statutory policy but the express terms of Section 706(g) that prohibit quota relief. Thus, our argument follows a fortiori from *System Federation*. In *System Federation*, the consent decree did not violate any express statutory prohibition; no provision of the Railway Labor Act forbade a consent decree guaranteeing an open shop. It was therefore necessary for the Court to consider whether the consent decree conflicted with statutory policy.[21] Here the issue is much simpler be-

[21] This distinction is important because it exposes the error in the court of appeals' attempt to distinguish *System Federation* from the instant case. The court of appeals apparently believed that a consent decree is "in conflict with statutory objectives" within the meaning of *System Federation*, 364 U.S. at 651, only if it affirmatively violates the substantive rights secured by the relevant statute. Such a rule, however, is contrary to the holding and analysis in *System Federation* because in that case the consent order did not require conduct that violated the substantive provisions of the Railway Labor Act. As amended, the Railway Labor Act did not require the employer to discriminate against nonunion members; it simply permitted it voluntarily to enter into a collective bargaining agreement that so discriminated. See 364 U.S. at 644-645. Thus, the order to which the employer consented (guaranteeing nondiscrimination) simply required the employer to take action that it could have voluntarily taken without violating any statutory rights of its union employees. The lower courts in *System Federation* (see page 22, *supra*), like the court of appeals in the present case, held that this provision of the consent decree was a permissible remedial order because the employer was simply consenting to do something that was not prohibited by the substantive provisions of the statute in question. This Court's reversal, however, demonstrates that a consent decree that requires an employer to take

cause consent orders awarding quota relief are expressly barred by statute.

b. The remedial restriction in Section 706(g) serves an important function in consent decrees because the vital interests of innocent nonminority employees and potential employees are at stake. It is one thing for consenting parties to enter into a consent decree affecting only their own rights. But a Title VII consent decree awarding preferences in hiring, promotions, seniority, or lay-offs to "minority" employees or prospective employees necessarily disadvantages those individuals who are not preferred. Neither the plaintiffs who sought such relief nor the employer who acceded to it can be counted on to protect the interests of the individuals who are disadvantaged by the decree. The employer may be all too willing to sacrifice the rights and interests of some employees or prospective employees in order to settle burdensome and costly litigation. Indeed, the employer may find it advantageous to barter away the rights of some present or prospective employees in exchange for relinquishment by the plaintiffs of their monetary claims. In addition, a public employer responsible to an electorate in which "minorities" are politically powerful may have a strong incentive to enter into a consent decree awarding preferential treatment to "minority" group members. If the relief available in a Title VII consent judgment is not subject to statutory limitations and if the courts do not police those limitations, the legitimate rights and in-

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action that does not violate its employees' statutory rights may nonetheless be inconsistent with the underlying statutory scheme. In *System Federation*, this Court perceived such an inconsistency because the order granted rights to certain employees that were in no way provided by the statute and thus deprived other employees of opportunities that the statute intended to make available to them. The consent order at issue in this case suffers from an identical deficiency since nonvictims of discrimination have no right to preferential treatment and such preferences similarly circumscribe the opportunities that Congress intended to make available to other employees. In any event, as noted above, the defect in the order entered here is more basic because, unlike *System Federation*, it directly conflicts with an express statutory prohibition.

terests of employees who do not belong to the favored groups will frequently be sacrificed.

In a related context, this Court has emphasized that an employer may not unilaterally bargain away in a Title VII conciliation agreement the employment opportunities of its non-minority employees, particularly where, as here, those opportunities have been contractually protected in a collective bargaining agreement. In *W.R. Grace & Co.* v. *Rubber Workers*, 461 U.S. 757, 771 (1983), the Court stated:

> [A]lthough the Company and the Commission agreed to nullify the collective-bargaining agreement's seniority provisions, the conciliation process did not include the Union. Absent a judicial determination, the Commission, not to mention the Company, cannot alter the collective bargaining agreement without the Union's consent.

See also, *Stotts*, slip op. 6 n.3 (O'Connor, J., concurring).

In the present case, the abridgment of the rights of non-minority employees is particularly striking, for here the union representing all the employees intervened of right, thereby agreeing to be bound by the court's judgment, and strenuously objected to the entry of the consent degree.[22] Nevertheless, the court entered the decree. The court did not adjudicate the lawfulness of the provisions of the decree abrogating portions of the union's collective bargaining agreement and significantly disadvantaging its non-minority members. The court issued no findings of fact or conclusions of law. None of the

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[22] For this reason, the court of appeals' attempt to distinguish *Stotts* from the instant case on the ground that *Stotts* involved "a *disputed modification* of a consent decree" (Pet. App. A18, quoting *Stotts*, slip op. 13 n.9 (emphasis supplied by *Vanguards* opinion)) is clearly unavailing. Entry of the consent decree here, like modification of the consent decree in *Stotts*, was vigorously "disputed" by petitioner, a full party to the case and the only one whose interests were directly affected by the contested quota provision. Accordingly, even assuming that *Stotts'* application of the *System Federation* principle did not reach true consent decrees (in the sense that all affected parties had consented), the consent order at issue in this case is invalid under *Stotts* because entry was disputed by petitioner.

procedures generally required by due process was followed. All of this was dispensed with because the judgment was labeled a "consent" decree. But this label is a misnomer because those who must bear the brunt of the decree, the union and the non-minority employees, did not consent.

It is elementary that a party cannot be bound to a "consent" decree unless that party in fact consents. For example, in *United States* v. *Ward Baking Co.*, 376 U.S. 327 (1964), the Court held that a district court could not enter a "consent" judgment without the consent of the United States, which had initiated the suit. See also, *e.g.*, *Hughes* v. *United States*, 342 U.S. 353, 357-358 (1952) (consent decree cannot be substantially modified without consent of all parties or judicial adjudication); *Centron Corp.* v. *United States*, 585 F.2d 982, 987 (Ct. Cl. 1978); 49 C.J.S. *Judgments* § 174(b) at 311 (1947) ("Judgment by consent may be rendered only on consent of all parties interested and to be bound, or their duly authorized agents."); *cf. United States* v. *Armour & Co.*, 402 U.S. 673, 682 (1971).

The same rule applies to intervenors, who are parties and are therefore bound by the judgment.[25] See, *e.g.*, *United States* v. *Oregon*, 657 F.2d 1009, 1014 (9th Cir. 1981); *In re First Colonial Corp. of America*, 544 F.2d 1291, 1298 (5th Cir.), cert. denied, 431 U.S. 904 (1977); 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1920 (1972); 3B J. Moore & J. Kennedy, *Moore's Federal Practice* ¶ 24.16[6], at 24-180 to 24-182 (2d ed. 1985). As Professor Moore states (*id.* at 24-181): "Once

[25] We do not address the rights of permissive intervenors (Fed. R. Civ. P. 24(b)). Permissive intervention is discretionary and may be denied if it "will unduly delay or prejudice the adjudication of the rights of the original parties." Accordingly, we believe that permissive intervention could properly be denied or terminated to permit the entry of a consent judgment between the original parties. In the present case, however, petitioner's right to intervene under Fed. R. Civ. P. 24(a)(2) is beyond serious dispute. This case threatened both the existing collective bargaining agreement and petitioner's ability to negotiate important terms and conditions of employment in future contracts.

intervention has been allowed the original parties may not stipulate away the rights of the intervenor." [26]

[26] These fundamental principles have been applied by the Fifth Circuit in a series of employment discrimination decisions. *See EEOC* v. *Safeway Stores, Inc.*, 714 F.2d 567, 576-580 (1983), cert. denied, No. 83-1257 (May 21, 1984); *United States* v. *City of Miami*, 664 F.2d 435 (1981); *High* v. *Braniff Airways, Inc.*, 592 F.2d 1330 (1979); *Wheeler* v. *American Home Product Corp.*, 582 F.2d 891, 896 (1977). However, a number of courts have approved the practice of entering nonconsent consent decrees such as that at issue here. See, *e.g.*, *Kirkland* v. *New York State Department of Correctional Services*, 711 F.2d 1117, 1126 (2d Cir. 1983); *Stotts* v. *Memphis Fire Dep't (Stotts II)*, 679 F.2d 579, 584 n.3 (6th Cir.), cert. denied, 459 U.S. 969 (1982); *Stotts* v. *Memphis Fire Dep't (Stotts I)*, 679 F.2d 541, 554 (6th Cir. 1982), rev'd on other grounds, No. 82-206 (June 12, 1984); *Dawson* v. *Pastrick*, 600 F.2d 70, 74-76 (7th Cir. 1979); *Airline Stewards* v. *American Airlines, Inc.*, 573 F.2d 960, 964 (7th Cir. 1978); see also *United States* v. *City of Miami*, 664 F.2d 435, 461-462 (5th Cir. 1981) (Johnson, J., concurring and dissenting in part, joined by six other judges). There is no justification for this practice.

It has been stated that an objecting union or non-minority employee may not resist entry of a consent decree if the court concludes (albeit without following the procedures that would be required before entering judgment in a contested case) that the decree does not unlawfully affect the intervenor's rights. See *Kirkland*, 711 F.2d at 1126; *United States* v. *City of Miami*, 664 F.2d at 462 (Johnson, J., concurring and dissenting in part); *Stotts II*, 679 F.2d at 584 n.3. This argument must fail because it justifies the failure to adjudicate the lawfulness of the relief awarded in the decree by assuming at the outset that the relief is lawful. *See United States* v. *City of Miami*, 664 F.2d at 452 (Gee, J., concurring and dissenting in part, joined by 10 other judges).

A second argument is that a rule enabling the union or non-minority employees to veto a proposed consent decree would hamper efforts to settle Title VII cases. *Kirkland* v. *New York State Department of Correctional Services*, 711 F.2d at 1126; *Dawson* v. *Pastrick*, 600 F.2d at 75-76; *Airline Stewards*, 573 F.2d at 963-964. But the policy favoring voluntary settlement does not justify "ramming a settlement between two consenting parties down the throat of a third and protesting one." *United States* v. *City of Miami*, 664 F.2d at 451 (Gee, J., concurring and dissenting in part); see *Stotts*, slip op. 7 n.4 (O'Connor, J., concurring).

Finally, it has been suggested that unions and employees who object to a proposed Title VII "consent" decree are not due anything more than an opportunity to voice their objections before the decree

E. Application Of The Remedial Principle In Section 706(g) Will Not Frustrate The Settlement Of Title VII Suits But Will Ensure That The Interests Of All Affected Are Honored

Recognition that the remedial principle in Section 706(g) applies to consent decrees as well as litigated decrees will not frustrate the settlement of Title VII suits. As previously noted, it is a general rule that equitable remedies should be tailored to fit the underlying violation of law. Thus, the problem of crafting victim-specific relief in Title VII class actions is not different in kind from the problem of determining appropriate relief in other class action settings.

Courts have developed a wide variety of practical approaches to the remedial phase of litigated class actions. In some instances, individualized relief determinations can be made mechanically once threshold issues of law common to the class are decided. In other cases, it may be necessary for a magistrate to make certain factual determinations as to individual class members within a legal framework developed by the district court. Similar techniques can be and are routinely applied in the consensual resolution of the remedial phase of class actions. In a settlement context, the parties agree on a formula for identifying class members who have been injured and for determining the degree of their injury.[28]

There is no reason why these same well-established techniques cannot be successfully used in Title VII cases

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to entered. See, e.g., *Kirkland*, 711 F.2d at 1126; *Airline Stewards*, 573 F.2d at 964. This argument amounts to the contention that the objectors have no substantive rights to be considered, and thus that due process is satisfied if a party is given a right of allocution before judgment is pronounced.

[28] If the formula is simple and mechanical, the parties will have no trouble applying it themselves. Even if the formula is complex or requires judgments about the facts relating to individual claims, the parties may still be able to settle the case without outside assistance if their counsel are able to develop a cooperative relationship. Alternatively, a wide variety of techniques are available to help parties sort through individual claims once ground rules for settlement are agreed upon. For example, individual claims may be presented to a magistrate or an arbitrator chosen by the parties.

to frame consensual relief that satisfies Section 706(g). The defendant employer need not concede discrimination any more than a concession of liability is needed to settle other types of cases. Nor is it necessary for there to be a judicial or quasi-judicial determination of whether and to what extent each class member is an actual victim of discrimination. Rather, the parties may identify those entitled to relief by assessing the nature and effect of the allegedly discriminatory practices and applying that assessment to the facts of individual cases. This process would involve establishing criteria for determining whether a member of the affected class would have received the relevant employment benefit absent the challenged practice.[29]

The government's experience, both as plaintiff and defendant, in crafting victim-specific relief in cases involving a pattern or practice of discrimination under Title VII demonstrates that a properly tailored settlement is not particularly difficult to formulate or obtain. In recent years, the United States, as plaintiff, has entered into at least 33 Title VII consent decrees that provide exclusively victim-specific relief. In *United States* v. *Fairfax County*, No. 78-862-A (E.D. Va.), for example, the parties agreed in a consent decree upon monetary compensation of $2,750,000 and priority job offers to 650 claimants. The government's experience also shows that an employer's desire not to concede discrimination is no roadblock to settlement under the proper remedial principle. For example, in *United States* v. *Nassau County*, Civ. No. 77-C-1881 (E.D.N.Y.), a settlement involving several hundred individual claims was reached between

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[29] A requirement that settling parties abide by the principle of victim-specificity will not only protect the interests of innocent non-minority employees but will ensure that the claims of the actual victims of the discrimination are not sacrificed in favor of quota relief for a larger class of non-victims. For example, an individual class member who is entitled to back pay and an immediate promotion would not be well served by a remedy providing only future quota relief.

the government and the county prior to trial and without any admission of liability.

It goes without saying that application of Section 706(g) to consent decrees will not interfere with the ability of courts to grant prospective relief enjoining the use of discriminatory practices. Finally, it should be noted that private parties wishing to escape the strictures of Section 706(g) can always settle a case on their own terms by filing a stipulation of dismissal under Fed. R. Civ. P. 41(a)(1). Such a disposition is not governed by Section 706(g) because the settlement is not embodied in a court order and thus "will not affect (not demonstrably, anyway) third parties or involve the judge in carrying out the underlying settlement." *Donovan* v. *Robbins*, 752 F.2d 1170, 1176 (7th Cir. 1985). Of course, Title VII litigants frequently prefer to encase quota relief in a consent decree, rather than a private settlement agreement, precisely because they want to foreclose subsequent legal challenge by non-minority employees who are adversely affected. But if non-minority employees "are to be required to make any sacrifices in the final consent decree, they must be represented and have * * * full participation rights in the negotiation process." *Stotts*, slip op. 6 n.3 (O'Connor, J., concurring).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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DECEMBER 1985

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
DEC 2 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1999

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, C.L.C.,
Petitioner,

vs.

CITY OF CLEVELAND, *et al.*,

and

VANGUARDS OF CLEVELAND,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF OF THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, C.L.C. AS AMICUS CURIAE

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LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, C.L.C.,
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vs.

CITY OF CLEVELAND, *et al.*,

and

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, C.L.C. AS AMICUS CURIAE

INTEREST OF THE IAFF AS AMICUS CURIAE *

The International Association of Fire Fighters, AFL-CIO, C.L.C. (IAFF) is an unincorporated association comprised of municipal, state, and federal fire fighters throughout the United States and Canada. The current membership includes approximately 153,000 state and municipal fire fighters employed by states, cities, and

* This brief is filed with the consent of all parties. The letters of consent have been filed with the Clerk of the Court.

towns across the United States. This Brief is filed in support of Petitioner, IAFF Local No. 93.

The IAFF's objectives include promoting and securing improved wages, hours, and working conditions of fire fighters through collective bargaining, legislation, legal action, and other appropriate means.

The IAFF here represents the interests of its many members across the country who are employed in cities and towns whose personnel policies and practices are now, or may be, affected by the terms of consent decrees entered in settlement of employment discrimination lawsuits. Many of these jurisdictions have entered into collective bargaining agreements with affiliates of the IAFF establishing seniority systems; others have established such systems by state and/or local laws, policies and practices. Most of these jurisdictions also operate pursuant to civil service laws which prescribe procedures for promotions.

The declared policy of the IAFF, consistent with this Court's holding in *Stotts*, is that relief in employment discrimination cases which challenge promotion policies and practices should be limited to actual, identifiable victims of discrimination.

ISSUES TO BE COVERED

This brief addresses a central question in this case: May a federal court grant enhanced promotion status to minority employees who are not identified victims of discrimination simply because of race? The orders of the lower courts do just that, thereby causing innocent non-minority employees to be deprived of promotions which they otherwise would have achieved by virtue of their seniority and examination scores.

The challenged order of the District Court at the heart of this case arose from the settlement of an employment discrimination complaint brought by black and Hispanic

employees attacking promotion practices in the Cleveland Fire Department. Those practices included a system by which employees were listed as eligible for promotion in the order of the total points they had achieved in various areas, based upon their examination scores and seniority credits. The settlement [1] was reached between the City and the plaintiffs and approved by the District Court over the objections of petitioner IAFF Local 93, the representative of the employees under a collective bargaining agreement with the City, which had previously intervened as a matter of right under Fed. R. Civ. P. 24(a)(2).

The consent decree containing the settlement terms set specific numerical promotion requirements, both in terms of actual promotions and percentage goals. For example, 52 promotions to the ranks of Assistant Chief of Fire, Battalion Chief and Captain of Fire were first to be made from the ranks of black and Hispanic employees. Pet. App. A4, A33-A34. Sixty-six promotions to lieutenant were to be made "on the basis of one non-minority to one minority appointee, based on the relative eligible list ranking of the individuals, a minority and non-minority appointment being coupled." Pet. App. A4-A5, A34. As a result, seniority credits and examination scores became important only among employees of the same race. The Court, in entering judgment based on the decree, further required the maintenance of percentage goals of minority employees in these higher echelon positions for a period of four years thereafter. Pet. App. A6, A34, A37.

While the District Court found that discrimination in promotions did exist in the Fire Department, no attempt was made in fashioning relief to identify those employees who were actual victims of that discrimination. The

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[1] A tentative settlement agreement was rejected by a negative vote of 68% of the membership of petitioner. Pet. App. A71.

case went through no remedial stage wherein the propriety of individualized relief could be considered.

A majority of the Court of Appeals panel,[1] over the vigorous dissent of Circuit Judge Kennedy, affirmed the District Court's order. The panel majority apparently was persuaded that the order did not "trammel[] the interests of the non-minority firefighters" because the restriction it placed on their advancement was not "an absolute bar." Pet. App. A11, A12. The panel majority found this Court's decision in *Firefighters Local Union No. 1784 v. Stotts*, —— U.S. ——, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1984) distinguishable on two grounds: first, that the decree here did not abrogate a valid seniority system to the detriment of the non-minority fire fighters and, second, that the Court enjoyed wider latitude in approving this decree because Cleveland, unlike the City of Memphis, did not oppose the relief being imposed. Pet. App. A12-A20. Circuit Judge Kennedy disagreed with both of these propositions. Pet. App. A20-A28.

The purpose of this brief *amicus curiae* is to explore the ramifications of this Court's decision in *Stotts* and to show that the lower court's action in these circumstances exceeded the limitations placed upon the federal judiciary by Title VII itself.

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[1] Circuit Judge Contie and District Judge Cook, sitting by designation.

ARGUMENT

I.

The special promotion status granted minority employees by the court below stems from a consent decree to which non-minority employees objected. In adopting that decree, the District Court's authority is derived not from the agreement of the two parties who presented the settlement to the court but rather "only from the statute which the decree is intended to enforce." *System Federation No. 91 v. Wright*, 364 U.S. 642, 651 (1961), cited with approval in *Stotts*, 104 S.Ct. at 2587, n. 9. Stated in plain terms, private parties can not enlarge the actual authority granted to the courts pursuant to a congressional enactment. Consequently, unless Title VII authorizes a federal court to grant preferential promotion status to minority employees solely because of their race, the judgment approving the consent decree should not have been entered.

The boundaries of a federal court's authority in fashioning relief in an employment discrimination case was at the core of this Court's opinion in *Stotts*. The lower court in *Stotts* had directed the maintenance of separate minority and nonminority lists with respect to seniority for layoffs and recall. The purpose of this order was to prevent the operation of the City's last-hired, first-fired layoff policy, the routine application of which would have resulted in some minority employees hired by virtue of remedial measures contained in an earlier consent decree temporarily losing their jobs. None of these minority employees were proven victims of unlawful discrimination.

This Court held that the grant of competitive seniority to these non-victims of discrimination exceeded the lower court's authority, both because of the protected status afforded bona fide seniority systems by Section 703(h) of Title VII and the individualized focus of Section

706(g), the remedial section of the Act. These provisions, the Court held, provide consistent complementary support for the proposition "that a court can award competitive seniority *only* when the beneficiary of the award has actually been a victim of illegal discrimination." *Stotts*, 104 S.Ct. at 2588-2589 (emphasis added).

Competitive seniority, however, was not the principal focus of the *Stotts* analysis. On the contrary, since the Court in *Stotts* was confronted primarily with the question of the limitations on court-ordered relief under Title VII, the remedial provision of that statute necessarily was given particular importance. Section 706(g) governs the relief generally available in Title VII cases and, accordingly, it was examined at length in the *Stotts* opinion. Here too, the fundamental issue involves the propriety of the relief granted by the lower court and its impact on innocent third parties who objected to that relief. In this context, the limitations on relief contemplated by Congress when it crafted Section 706(g) become the fulcrum point of the instant case.

The language of Section 706(g) itself restricts the relief that may be ordered to remedy unlawful discrimination. Section 706(g) expressly forbids a court from "requir[ing] the hiring, reinstatement, or promotion of an individual as an employee . . . if such individual was . . . refused employment *or* advancement *or* was suspended *or* discharged for any reason *other* than discrimination . . ." Nevertheless, Congressional opponents of Title VII charged that the bill would allow courts to order the wholesale restructuring of work forces solely to achieve so-called 'racial balance.' This provoked an emphatic rebuttal from sponsors and supporters of the legislation that the possibility did not exist.[5] This Court's succinct summation of

[5] When asked by Senator Dirksen whether seniority rights in the promotion process would be affected by Title VII, Senator Clark, one of the bipartisan "captains" of the legislation, answered that they "are in no way affected." 110 Cong. Rec. at 7217.

the congressional policy underlying Section 706(g) is directly to the point: "That policy . . . is to provide make-whole relief *only* to those who have been actual victims of illegal discrimination." *Id.* at 2589. (Emphasis added).[6]

There simply is no escape from the fact that the consent decree here directly contravenes the language and intent of Section 706(g). As Circuit Judge Kennedy stressed in her dissent, many of the minority fire fighters whom the decree benefits had not even been eligible for promotion before the decree was entered. Pet. App. A23. *A fortiori*, they could not conceivably have been victimized by discrimination in promotions. Nevertheless, the decree provides them with make-whole relief at the expense of the non-minority workers who unquestionably have achieved greater on-the-job entitlements normally considered in the promotion process.

The panel majority disregarded the restrictions of Section 706(g) with the misguided conclusion that the City's consent to the decree rendered the relief imposed by the District Court's judgment "voluntary." Pet. App. A20. Accordingly, it stated that since the employer agreed to afford the relief, no court order was required (even

[6] This was not the first occasion on which this Court analyzed and approved the individualized focus of laws designed to protect against and remedy employment discrimination. See, *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 774-780 (1976) (Title VII); *Teamsters v. United States*, 431 U.S. 324, 357-377 (1977) (Title VII); *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 710 (1978) (Title VII); *Connecticut v. Teal*, 457 U.S. 440, 452-454 (1982) (Title VII); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (Fourteenth Amendment); *General Building Contractors Association, Inc. v. Pennsylvania*, 458 U.S. 375, 385-391 (1982) (42 U.S.C. §1981). See also, *Cooper v. Federal Reserve Bank of Richmond*, —— U.S. ——, 81 L.Ed.2d 718, 728 (1984) ("While a finding of a pattern or practice of discrimination itself justifies an award of prospective relief to the class, additional proceedings are ordinarily required to determine the scope of individual relief for the members of the class.").

though one was actually entered; so the limitations on the court's authority to bind a non-consenting party were not invoked.

The fallacies in this specious reasoning are obvious. First and foremost, as mentioned above, the narrow range of the courts' remedial powers under Title VII is not determined by the dispositions of the parties to consent or litigate. A court order is a court order, whether entered after litigation or by consent, and the boundaries of the courts' authority are fixed by the statute under which the case is brought. *See, System Federation v. Wright*, 364 U.S. 642, 650-51 (1961).

Secondly, the relief awarded here certainly was not agreed upon by all parties. Tripartite negotiations occurred under the aegis of a federal magistrate. While the plaintiffs and the City agreed to the race-conscious provisions of the decree, the union did not. The union's consistent opposition to the plan was expressly acknowledged by the lower court. Pet. App. A4, A31.

Consequently, the decree clearly falls outside the parameters of *United Steelworkers v. Weber*, 443 U.S. 193 (1979). This is simply not a *Weber* case. *Weber* arose in a collective bargaining setting—here in a contested court proceeding. In *Weber*, the union agreed to the race-conscious affirmative action plan—here the employees' bargaining representative strenuously opposed it and the court imposed the decree over the union's objection. A clearer distinction can hardly be drawn. The consent of the union in a non-judicial setting in *Weber* was the essential element in this Court's opinion: "[S]ince the Kaiser-USWA plan was adopted voluntarily, we are not concerned with what Title VII requires or with what a court might order to remedy a past proved violation of the Act." 443 U.S. at 208.

Finally, the consent decree is not simply a private contract between the plaintiffs and the City. It is the final

judgment of the District Court. It possesses all the essentials of any other judicial instrument. Its terms are "ORDERED, ADJUDGED AND DECREED." Pet. App. A32. Failure of any of the parties, including the intervenor union, to comply with its terms can result in sanctions such as contempt. Control over the decree rests not with the parties, but with the court:

> Exclusive jurisdiction is reserved in the Court for all purposes of enforcement, modification, or amendment of this Decree upon the application of any party, including Intervenor, either to guarantee the continuing effectuation of the goal of eliminating the ongoing vestiges of past discrimination alleged by Plaintiff as it imports upon promotion within the Division of Fire, or to terminate any further jurisdiction upon a satisfactory showing by any party, including Intervenor, that the aims and objectives of the decree have been achieved and can reasonably be expected to be fulfilled in the future, or to alter the terms of this Decree in order to meet unanticipated changes and circumstances. Without limiting this general reservation, the Court specifically reserves jurisdiction with regard to any court challenges which may be presented to any of the promotional examinations or eligible lists provided for herein. [Emphasis added].

Pet. App. A39.

The viewpoint that the decree entered in this Title VII case is something less than a Section 706(g) order is little short of incredible.

II.

While Section 706(g) represents the keystone of the *Stotts* decision, Section 703(h) and the special protections afforded seniority certainly played a significant part in this Court's determination. "Title VII precludes a district court from displacing a non-minority employee with seniority . . . absent either a finding that the senio-

ity system was adopted with a discriminatory intent or a determination that such a remedy was necessary to make whole a proven victim of discrimination." *Stotts*, 104 S.Ct. at 2587, n.9.

Despite this, respondents would have this Court affirm the lower court's decision embodying the conclusion that the consent decree here has no effect on seniority. As Judge Kennedy emphasized below in her dissent, the conclusion that this case does not involve seniority is contrary to the record. Before the entry of the consent decree, time on the job was an integral element of the City's promotion equation. The collective bargaining agreement between the City and Local 93, as well as the applicable civil service laws, provide for a promotion system keyed to examination scores *and seniority points*. The decree changed this; seniority has now been relegated to a tool for distinguishing solely among employees of the same race. As the dissent correctly pointed out, the decree creates separate minority and non-minority promotion lists, "in effect giv[ing junior] minority fire fighters superseniority over all non-minority fire fighters for promotion purposes." Pet. App. A22.

The seniority implications of the consent decree here parallel those in *Stotts*. Thus, "it is [no less] inappropriate to deny an innocent employee the benefits of his seniority" here than it was in the Memphis layoff situation. 104 S.Ct. at 2580. In both cases, the sole basis for the preferred status created by the consent decree was "mere membership in the disadvantaged class." *Id.* Neither decree is supported by a finding that any of the minority employees who enjoy preferred status had been a victim of discrimination or was entitled to an award of competitive seniority. *Id.* Further, neither decree "purported to identify any specific employee entitled to particular relief." *Id.* In these circumstances, the dilution of the accrued seniority rights of the non-minority employees by the creation of dual promotion lists was

relief which the District Court was without authority to grant. *See, Teamsters v. United States*, 431 U.S. 324, 348-354 (1977).[5]

III.

The relief granted here—requiring the maintenance of separate minority and nonminority lists with respect to promotions—was not designed to be that type of constructive seniority relief sanctioned by this Court's opinions in *Franks v. Bowman Transp. Co.*,[6] *Teamsters*, and *Stotts*. As a result, minority employees not themselves victims of discrimination have been afforded relief by the district court as if they were.

In this sense, the consent decree is not remedial. It is not designed to secure relief for individuals who have been subjected to discrimination, i.e. to make them whole. Rather, it provides rewards to certain employees for simply being members of a disadvantaged class, and it does so at the expense of innocent employees. These newly privileged employees, all non-victims, now enjoy artificially enhanced credentials for purposes of promotions. Their rightful place, as non-victims, was precisely where they stood prior to entry of the decree. Absent some individualized determination to the contrary, no valid legal basis existed to place them anywhere else.

Here, up until the entry of the lower court's decree, there were non-victims on both sides of the scale. Be-

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[5] In *Teamsters*, the Court placed its imprimatur on the validity of a practice whereby the longest tenured employees, even though they might without exception be white, would enjoy a " 'disproportionate distribution of advantages [which] in a very real sense [would] operate to "freeze" the status quo of prior discriminatory employment practices' " (431 U.S. at 350). *Teamsters* acknowledged that this perpetuation effect could not overcome "the congressional judgment . . . that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees. . . ." 431 U.S. at 353.

[6] 424 U.S. 747 (1976).

cause no finding of individualized discrimination has ever occurred in this case, the sole rationale for tipping the scale became race. Briefly stated, the only reason the minority employees will be promoted ahead of their more senior co-workers is because the minority employees are Black or Hispanic and their fellow fire fighters are not.

Ironically, there were no ascertainable victims in this case until the issuance of the court's decree—and then the victims became the non-minority workers who were forced, over their objections, to surrender their seniority and other entitlements they had earned on the job. Neither the provisions of Title VII, the decisions of this Court, nor basic principles of equity sanction the denial of a promotion to an innocent employee in order to award a promotion to another who has suffered no discrimination and whose only credential for the award is that he happens to be a different color.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

Nos. 84-1656 and 84-1999

Supreme Court, U.S.
FILED
DEC 2 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, *et al.*,
Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*,
Respondents.

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, C.L.C.,
Petitioner,

v.

CITY OF CLEVELAND, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Second and Sixth Circuits

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BRIEF OF LOCAL 542, INTERNATIONAL UNION OF OPERATING ENGINEERS AND LOCAL 36, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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BRIEF OF LOCAL 542, INTERNATIONAL UNION OF OPERATING ENGINEERS AND LOCAL 36, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICI CURIAE

Local 542, International Union of Operating Engineers, is the exclusive bargaining representative for all unionized operating engineers in Eastern Pennsylvania and Delaware. Local 36, International Association of Firefighters, AFL-CIO, is the exclusive bargaining representative for all members of the uniformed force of the District of Columbia Fire Department in the ranks of Firefighter through Captain. Each of these amici is presently involved in litigation concerning the legitimacy of court-ordered or governmentally imposed racial quotas in the employment context. See *Local Union 542, International Union of Operating Engineers v. Commonwealth of Pennsylvania, et al., pet. for cert. pending*, No. 85-828; *Hammon v. Barry*, 606 F. Supp. 1082 (D.D.C. 1985). The principles by which this Court decides the instant cases may well determine the validity or invalidity of the racial quotas at issue in amici's cases. Amici file this brief amici curiae with the consent of the parties as provided for in the Rules of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This brief addresses only the question whether courts are authorized to order racial quotas as remedies for employment discrimination found to violate Title VII of the Civil Rights Act of 1964 or 42 U.S.C. §§ 1981 or 1983.[1] More specifically, the question is whether under

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[1] The petitions in these cases do not expressly raise any question regarding the authority of courts to order racial quotas as remedies for violations of §§ 1981 or 1983. However, in No. 84-1999 *(Local Number 93)* the complaint was premised on §§ 1981 and 1983 as well as Title VII, and presumably so was the consent decree containing the racial quotas. Accordingly, in No. 84-1999 the Court

these statutes a court may order that persons of one race be deprived of jobs, solely because of their race, in order to open those jobs to persons of another race who have not been victims of the discrimination practiced by the defendant.

This brief will examine the pertinent legislative history of Title VII and show the following: (1) In 1964, when the law was enacted, Congress expressly determined that courts would not be authorized to order racial quotas; (2) in 1972, when certain provisions of Title VII were amended, Congress exhibited full awareness of its earlier decision to prohibit court-ordered racial quotas, and determined not to alter that decision.

With respect to the remedial authority of courts in actions brought under §§ 1981 or 1983, we will show: that the post-Civil War Congress that enacted those provisions—as well as the companion provision, 42 U.S.C. § 1988—did not intend to authorize quota remedies; and that, if those provisions are to be interpreted in light of "modern law," the judgment of Congress to prohibit court-ordered quotas under Title VII precludes courts from construing the post-Civil War statutes to reach a contrary result.

ARGUMENT

I. TITLE VII DOES NOT AUTHORIZE COURTS TO AWARD RACIAL QUOTA REMEDIES

In *Firefighters Local Union No. 1784 v. Stotts*, —— U.S. ——, 104 S.Ct. 2576, 2588-89 (1984), this Court stated that "the policy behind § 706(g) of Title VII . . . . is to provide make-whole relief *only* to those who have been actual victims of illegal discrimination . . ." (em-

may address the validity of racial quota remedies for violations of §§ 1981 or 1983. The question of the validity of quota remedies under § 1981 is directly presented in the petition for certiorari filed by amicus Local 542 in *Local Union 542, International Union of Operating Engineers v. Commonwealth of Pennsylvania, et al.*, No. 85-828.

phasis added), and that the quota before the Court in *Stotts* "runs counter" to that policy (*id.* at 2590, n. 17). Section 706(g) is *the* provision that creates and establishes the limits of the remedial power of the courts under Title VII. There has been considerable doubt expressed in the lower courts as to whether the *Stotts* Court meant to preclude racial quotas as remedies for Title VII violations.[2] We do not propose here to debate what this Court intended in *Stotts*. For the question of the power of the courts to order racial quotas as remedies for Title VII violations is purely one of statutory interpretation. And, examination of the relevant legislative materials from 1964 and 1972 establishes that Congress left no doubt as to *its* intention on this question: Congress intended to preclude courts from ordering racial quota remedies in Title VII cases.

1. When Congress considered Title VII in 1964, the issue whether courts would be authorized to order racial quota remedies was expressly addressed. The sponsors of the bill in both the House and the Senate repeatedly and unequivocally confirmed that Title VII would not empower courts to order racial quota remedies.

Before the 1964 debate began, the bill's opponents cited quota remedies as one of the evils that would be produced. See, *e.g.*, H.R. Rep. 914, 88th Cong. 1st Sess. (1963) at 72. These opponents declared this "a not too subtle system of racism-in-reverse" (*id.* at 73).

When the bill reached the House floor, the opening speech in support of its passage was delivered by Repre-

[2] See, *e.g.*, *Commonwealth of Pennsylvania v. Local Union 542, International Union of Operating Engineers*, 770 F.2d 1068 (3d Cir. 1985) (table) (opinion published at 38 FEP Cases 673), *pet. for cert. pending*, No. 85-828; *Paradise v. Prescott*, 767 F.2d 1514, 1528-1530 (11th Cir. 1985); *Deveraux v. Geary*, 765 F.2d 268, 273 (1st Cir. 1985); *Turner v. Orr*, 759 F.2d 817, 823-824 (11th Cir. 1985), *pet. for cert. pending*, No. 85-177; *Britton v. South Bend Community School Corp.*, —— F.2d ——, 39 FEP Cases 170, 180-181 (7th Cir. 1985); *Diaz v. American Telephone & Telegraph*, 752 F.2d 1356, 1360 n.9 (9th Cir. 1985) (dictum).

sentative Celler, the Chairman of the House Judiciary Committee. A portion of that speech was devoted to answering the "unfair and unreasonable criticism" that had been leveled against the bill (110 Cong. Rec. 1518):

> In the event that wholly voluntary settlement proves to be impossible, the Commission could seek redress in the federal courts, but it would be required to prove in the court that the particular employer involved had in fact, discriminated against one or more of his employees because of race, religion or national origin . . .
>
> *Even then, the court could not order that any preference be given to any particular race, religion or other group but would be limited to ordering an end to discrimination.* [*Ibid* (emphasis added)].[3]

Subsequent to the House's passage of the bill, the Republican sponsors in the House published a memorandum describing the bill as passed. In pertinent part, the memorandum stated:

> Upon conclusion of the trial, the federal court may enjoin an employer or labor organization from practicing further discrimination and may order the hiring or reinstatement of an employee or the acceptance or reinstatement of a union member. But, *Title VII does not permit the ordering of racial quotas* in businesses or unions and does not permit interferences with seniority rights of employees or union members. [*Id.* at 6566 (emphasis added)].

When the bill was taken up by the Senate, Senators Humphrey and Kuchel, the co-managers of the entire bill, undertook a description of each of the titles. In the course of his description of Title VII, Senator Humphrey detailed the manner in which discrimination claims could be processed through suit and finding of discrimination, and then described the remedial powers available to a court:

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[3] See also *id.* at 1600 (Rep. Minish) ("no quota system will be set up").

> The relief sought in such a suit would be an injunction against future acts or practices of discrimination, but the Court could order appropriate affirmative relief, such as hiring or reinstatement of employees and payment of backpay. This relief is similar to that available under the National Labor Relations Act in connection with the unfair labor practices, 29 United States Code 160(b). No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of Section 707e [enacted, without change, as § 706(g)] . . . .
>
> • • •
>
> *Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require hiring, firing, or promotion of employees in order to meet a racial 'quota' or to achieve a certain racial balance.*
>
> *That bugaboo has been brought up a dozen times; but it is nonexistent.* [*Id.* at 6548 (emphasis added).]

Senator Kuchel made the other major opening speech in support of the bill. He, too, took pains to demonstrate that the remedial provisions would not permit court-ordered quotas:

> Title VII might justly be described as a modest step forward. Yet it is pictured by its opponents and detractors as an intrusion of numerous Federal inspectors into our economic life. These inspectors would presumably dictate to labor unions and their members with regard to job seniority, seniority in apprenticeship programs, racial balance in job classifications, racial balance in membership, and preferential advancement for members of so-called minority groups. Nothing could be further from the truth. I have noted that the Equal Employment Opportunity Commission is empowered merely to investigate specific charges of discrimination and attempt to

mediate or conciliate the dispute. It would have no authority to issue orders to anyone. Only a Federal court could do that, and only after it had been established in that court that discrimination because of race, religion, or national origin had in fact occurred. Any order issued by the Federal district court would, of course, be subject to appeal. *But the important point, in response to the scare charges which have been widely circulated to local unions throughout America, is that the Court cannot order preferential hiring or promotion consideration for any particular race, religion, or other group. Its power is solely limited to ordering an end to the discrimination which is in fact occurring.* [*Id.* at 6563 (emphasis added)].

Senators Clark and Case were the bipartisan "captains" of Title VII in the Senate. They prepared and submitted to the Senate an interpretative memorandum[4] which, *inter alia*, made clear that § 706(g) precluded courts from ordering preferential treatment for non-victims of discrimination:

> No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not discriminated against in violation of this title. This is stated expressly in the last sentence of section [706(g)] . . . [*Id.* at 7214].

Senator Clark also set before the Senate written answers he had prepared to certain "objections" which had been voiced to Title VII. To the objection that Title VII would "require employers to establish quotas for nonwhites in proportion to the percentage of nonwhites in the labor market," the answer was: "Quotas are themselves discriminatory." *Id* at 7218.

Each day during the Senate debates on the Civil Rights bill, the principal Senate sponsors prepared a Bipartisan Civil Rights Newsletter which was hand-delivered to the office of each Senator supporting the bill. Its purpose,

[4] This Court has recognized the "authoritative nature of [this] interpretative memorandum." *Stotts*, 104 S.Ct. at 2589 n.13; *American Tobacco Co. v. Patterson*, 456 U.S. 63, 73 (1982); *Teamsters v. United States*, 431 U.S. 324, 352 (1977).

as explained by Senator Humphrey, was "to keep Senators who are in favor of civil rights legislation informed of our point of view."[5] The April 11, 1964, issue of the Newsletter declared:

> Under title VII, *not even a Court*, much less the Commission, *could order racial quotas or the hiring, reinstatement, admission to membership or payment of back pay for anyone who is not discriminated against in violation of this title.* [*Id.* at 14465 (emphasis added)].

Senator Humphrey introduced an explanation of the House bill which he said had been "read and approved by the bipartisan floor managers of the bill in both houses of Congress." *Id.* at 11847. In pertinent part, the explanation provided:

> The relief available is a court order enjoining the offender from engaging further in discriminatory practices and directing the offender to take appropriate affirmative action; for example, reinstating or hiring employees, with or without back pay . . .
>
> *The Title does not provide that any preferential treatment in employment shall be given to Negroes or to any other persons or groups. It does not provide that any quota systems may be established to maintain racial balance in employment.* . . . The Title does not provide for the reinstatement or employment of a person, with or without back pay, if he was fired or refused employment or promotion for any reason other than discrimination prohibited by the Title. [*Ibid* (emphasis added)].

In addition to the materials just cited which directly and unambiguously relate to the power of *courts* to order racial quotas as "remedies," the 1964 legislative history is replete with more general statements by proponents of Title VII that racial quotas could not be imposed under Title VII, including numerous statements that

[5] *Id.* at 5042. It is apparent from the numerous references to the Newsletter in the floor debates, that the publication was widely read by Senators. See *id.* at 5044, 5046, 5079, 7474, 8369, 8912, 9105, 9870, 10622, 12210, 14464.

imposition of racial quotas would run counter to the anti-discrimination principles of the statute. For the convenience of the Court, we set forth a number of these statements in an appendix to this brief. Significantly, we have not found, nor has any advocate of racial quota relief under Title VII ever cited, a single instance in the 1964 legislative history in which any supporter of Title VII suggested that Title VII would provide for or permit court-ordered racial quotas.

2. What was said and done in 1964 shows conclusively that Congress in enacting Title VII intended to provide affirmative remedies for the victims of discrimination but not quota remedies benefiting nonvictims. Nothing Congress has said or done since 1964 provides a basis for reading Title VII, as amended in 1972, differently in this regard from Title VII as originally passed. Examination of the 1972 legislative materials shows: (i) that the only arguably pertinent legislative *act* in 1972 was designed to confirm that "rightful place" relief for *victims* is the remedial objective of Title VII, and not to reverse the determination in 1964 to preclude quota remedies; and (ii) that the 1972 Congress—particularly the House—recognized that the 1964 Congress had determined to rule out quota remedies, and had no wish to alter that determination.

a. In 1972, Congress amended the first sentence of § 706(g) to add the words "but is not limited to" and "any other equitable relief as the court deems appropriate" to the specification of remedies already listed in that provision. The only explanation for that amendment is contained in the Section-by Section Analysis that was introduced in both houses:

> Section 706(g)—This subsection is similar to the present section 706(g) of the Act. It authorizes the court, upon a finding that the respondent has engaged in or is engaging in an unlawful employment practice, to enjoin the respondent from such unlawful conduct and order such affirmative relief as may be appropriate including, but not limited to, reinstatement or hiring, with or without backpay, as will effectuate the policies of the Act. Backpay is limited to that which accrues from a date not more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the aggrieved person(s) would operate to reduce the backpay otherwise allowable.
>
> The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that *persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination* [118 Cong. Rec. 7166, 7168 (emphasis added)].*

As this Court explained in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 764 n.21 (1976), the Congress that "added the phrase speaking to 'other equitable relief' in § 706(g) . . . indicated that 'rightful place' was the intended objective of Title VII and the relief accorded thereunder." And, the Court understood the portion of the Section-by-Section Analysis quoted above to be "emphatic confirmation that federal courts are empowered to fashion such relief as the particular circum-

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* The Section-by-Section Analysis quoted in text was first submitted to the Senate by Senator Williams (the bill's floor manager in the Senate) prior to adoption of the Senate bill. Senator Williams submitted it again in conjunction with the Conference Report, as did Rep. Perkins in the House. See Legislative History of the Equal Employment Opportunity Act of 1972, prepared by the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare (Nov. 1972) (hereinafter "72 Leg. Hist."), pp. xv n.3, 1769, 1773-74, 1843-44, 1848, 1856.

stances of a case may require to effect restitution, making whole insofar as possible the *victims* of racial discrimination . . ." *Id.* at 764 (emphasis added).

There is not a word in the legislative history to suggest that "other equitable relief" was added to § 706(g) to authorize quota remedies, and it is hardly conceivable that so profound a departure from the anti-quota decision made in 1964 would have been accomplished without evidence of an intention to do so.

b. Not only did the 1972 Congress take no legislative act which purported to reverse the anti-quota decision of 1964, but that Congress also manifested a recognition and an acceptance of the fact that court-ordered racial quota remedies are barred under Title VII.

That recognition and acceptance are most readily seen in the debate in the House. That debate focused on two competing bills—one (H.R. 1746) introduced by Rep. Augustus Hawkins and reported out by the House Labor Committee, and the other (H.R. 9247) offered by Rep. John Erlenborn "as an amendment in the nature of a substitute." 72 Leg. Hist. 150-151. The principal differences between the bills—and the subject of virtually all the debate—involved matters wholly irrelevant to the issue here (*e.g.*, Should the EEOC be given "cease and desist" power? Should Title VII be extended to public employment?) Insofar as relevant here, the difference between the bills was that the Committee bill proposed to transfer administration of Executive Order 11246 from the Department of Labor's Office of Federal Contract Compliance (OFCC) to the EEOC, while the Erlenborn bill did not. The proposed transfer of OFCC administration to the EEOC in the Committee bill was perceived by some as providing the EEOC with a power to order quotas, for the OFCC in its administration of the Executive Order had made it a condition to receipt of government contracts that the contractor adopt "goals and timetables." The discussion of quotas in the House in 1972 centered on the propriety of giving the EEOC

power to require quotas under the Executive Order, with all sides agreeing that quotas could not be ordered under Title VII.

In support of his position that the OFCC administration should not be transferred to the EEOC, Rep. Erlenborn stated the theory on which quotas, although not authorized under Title VII, had been treated differently under the Executive Order:

> The OFCC is an altogether different type of jurisdiction [from the EEOC]. It is not based upon constitutional rights. It is not based upon statutory rights.
>
> The genesis of the power of the OFCC is the contractual relationship that exists between the Federal Government and those with whom they contract for the acquisition of goods and services. In this jurisdiction the OFCC can and does go beyond those powers granted by the 1964 Civil Rights Act. I think it is important to note that the Chairman of the Equal Employment Opportunity Commission himself has testified that you cannot mix these two enforcement authorities. [72 Leg. Hist. at 231].

Supporters of the Committee bill did not dispute the theoretical basis for such a distinction, and they proposed to resolve the dilemma not by leaving administration of the Executive Order with the OFCC, as Rep. Erlenborn would have done, but by making Title VII's ban on quotas equally applicable to the Executive Order. Their solution—incorporated in the so-called Dent Amendment to the Committee bill—was that coincident with transfer to the EEOC of authority to enforce the Executive Order, the EEOC should be "prohibited from imposing or requiring a quot[a] or preferential treatment." 72 Leg. Hist. at 189. Rep. Dent, the floor manager of the Committee bill, explained the reason for incorporating this express prohibition:

> My . . . amendment would forbid the EEOC from imposing any quotas or preferential treatment of any employees in its administration of the Federal

contract-compliance program. This responsibility, which is now vested in the Office of Federal Contract Compliance of the Department of Labor, would be transferred by H.R. 1746 to the Commission. *Such a prohibition against the imposition of quotas or preferential treatment already applies to actions brought under title VII. My amendment would, for the first time, apply these restrictions to the Federal contract-compliance program.* [72 Leg. Hist. at 190 (emphasis added). See also *id.* at 199 (Rep. Perkins); *id.* at 204, 208 (Rep. Hawkins)].

While there was some debate over the propriety of exacting quotas under the Executive Order as the price for receipt of government contracts (see, e.g., *id.*, at 202, 208-209, 222-223, 231), there was unanimity that quotas were not to be imposed under Title VII. Rep. Hawkins, the author of the Committee bill, declared:

> [S]*ome say that this bill seeks to establish quotas . . . Not only does Title VII prohibit this*, but it establishes beyond any doubt a prohibition against any individual white as well as black being discriminated against in employment. It only seeks to insure that persons will be treated on their individual merits and in accordance with their qualifications. [72 Leg. Hist. at 204 (emphasis added)].[7]

And Rep. Erlenborn, the author of the rival bill, correctly identified the narrow scope of the dialogue by pointing out that *neither the Committee bill nor the Erlenborn substitute "is going to repeal the prohibition against quotas that is in Title VII of the Civil Rights Act"* [*Id.* at 261 (emphasis added)].

In the end—over the opposition of those normally associated with the "liberal" position on civil rights matters, including the members of the Black Caucus[8]—the

[7] Rep. Hawkins later repeated, during a colloquy, that Title VII already "prohibits the establishment of quotas." *Id.* at 209.

[8] See e.g., *id.* at 223-224 (Rep. John Conyers); *id.* at 232, 269-272 (Rep. Fauntroy); *id.* at 233-234 (Rep. Parrin Mitchell); *id.* at 274-277 (Rep. Abzug); *id.* at 299-301 (Rep. Stokes).

House voted to adopt the Erlenborn substitute. *Id.* at 312-314. As that substitute did not provide for the transfer of OFCC administration to the EEOC, there was no occasion for the House to vote on the Dent amendment, which was never formally offered, nor on any other measure respecting the propriety of quotas under Executive Order 11246. What is important here is that all parties to the debate took as given, and did not propose to change, the fact that Title VII does not authorize court-ordered racial quotas.[9]

[9] The fact that the House debate manifests the uniform understanding that Title VII does not permit court-ordered quotas—not a surprising fact in view of the definitive resolution of that controversial issue just eight years earlier—precludes any notion that, because a few, isolated lower court cases purportedly authorizing court-ordered quotas had been decided by 1972, Congress should be deemed to have acted on the assumption that Title VII authorized such quotas.

Indeed our research has uncovered only two cases decided prior to the completion of the 1972 consideration of Title VII that even arguably approved quota remedies, and in both the approval was cryptic. In *Asbestos Workers v. Vogler*, 407 F.2d 1047 (5th Cir. 1969), the court upheld an injunction striking down nepotism and prior experience as requirements for union membership and "ordered the development of objective membership criteria," 407 F.2d at 1051, not racial quotas or preferences, to govern future admissions to union membership. Pending development of such objective criteria, the injunction prohibited new admissions of members (save identified discriminatees) and directed that during the interim period work referrals of existing members be made on a chronological basis, with alternating referrals of whites and blacks, *id.* In a cryptic passage near the end of its opinion, the Fifth Circuit explained that the temporary alternating referrals were required for "administrative reasons." *Id.* at 1055. In *United States v. Iron Workers Local 86*, 443 F.2d 544, 553-554 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971), the Court, relying on *Vogler*, sustained an injunction that contained compulsory numerical guidelines for minority admissions into apprentice programs, rejecting arguments that the injunction violated § 703(j). The court declared that the injunction it was affirming "did not establish a system of racial quotas or 'preferences' in violation of section 703(j)." 443 F.2d at 554. Thus while close reading of *Vogler* and *Ironworkers* reveals that orders establishing racial preferences were in fact approved, neither case purported to endorse court-ordered racial quotas in

While the Senate's consideration of proposed amendments was hardly more indicative of a desire to overturn the 1964 decision to prohibit quota remedies, we relegate discussion of the Senate's consideration to the margin. For given the House's clear opposition to quota remedies under Title VII, nothing the Senate might have done *alone* could have effectuated a turnaround of the 1964 decision. As this Court has recently confirmed, a congressional decision made by both houses and signed by the President may not later be overturned even by the positive action of one house, *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), and *a fortiori* cannot be found inferentially to have been overturned by rejection of proposed amendments within one house.[16]

Title VII cases. And there was as of 1972 case law and commentary supporting the opposite proposition, *viz.*, that quota remedies are not authorized under Title VIII. *Castro v. Beecher*, 334 F. Supp. 930, 945 (D. Mass. 1971); *Developments in the Law—Title VII*, 84 Harv. L. Rev. 1109, 1114-16 (1971).

To say the least, there was not on this issue in 1972 "established judicial precedent" "consistently and routinely" applied as there was in *Herman & MacLean v. Huddeston*, 459 U.S. 375, 385 (1983); see also, *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 379 (1982) ("the federal courts routinely and consistently had recognized an implied cause of action").

[16] In the Senate, there was one proposed amendment that related tangentially to the issue of court-ordered quotas. Senator Ervin, in the course of introducing numerous amendments to prolong a filibuster, introduced one prohibiting any "department, agency, or officer of the United States" from requiring employers to "practice discrimination in reverse by employing persons" in percentages or quotas on the basis of race, sex, religion or national origin (72 Leg. Hist. at 1017). This amendment, he explained, was addressed primarily to the OFCC's implementation of Executive Order 11246 to require government contractors to adopt quotas ("the Philadelphia Plan"), and secondarily to "[t]he EEOC", which "on less frequent occasions, has hailed employers before its bar to practice discrimination in reverse." (*Id.* at 1042-45.) The amendment was defeated by a vote of 44-22 (*Id.* at 1074-75).

Given the legislative dynamic in which the Ervin amendment was proposed—an ongoing filibuster that Senator Ervin was seeking to

3. It has been suggested that the last sentence of § 706(g) should be understood to be a limit on the relief available to *individuals* who are victims of unlawful discrimination but not to preclude a grant of preferential relief to a *class* of persons of the same race who are not victims. *See Stotts*, 104 S.Ct. at 2608-2609 (Blackmun J., joined by Brennan and Marshall JJ., dissenting). Such an interpretation would produce precisely the opposite result from that intended by Congress. The legislative history recounted above shows unmistakably that Congress decided that there were to be *no* quota remedies under Title VII. The unqualified assurances of the bill's sponsors would have been hollow, indeed, if they left room for quotas labelled "class-wide, race-conscious relief" (*Id.* at 2608). What quotas, after all, would not meet that description? It is self-evident that the fear to which these assurances were addressed was not that quotas would be awarded as relief to the victimized individuals (those individuals would be made whole by rightful place relief), but rather that quotas might eventuate from precisely the notion advanced by the dissenters in *Stotts:* that Title VII would be seen as an instrument for according preferences to races rather than relief to individuals. It was to refute that concern

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prolong through the introduction of multiple amendments—it is entirely possible that those seeking to end the filibuster (and who voted against all the amendments proposed by Senator Ervin) were basing their vote not on the substance of each amendment, but on the tactical judgment that the way to end the filibuster was to vote down each amendment proffered by those conducting the filibuster. Moreover, those not wishing to forbid goals and timetables under the Executive Order were required to vote against the Ervin Amendment, and the vote therefore cannot be understood as manifesting a desire to overturn Congress' 1964 decision disapproving court-imposed quotas under Title VII. The importance of such tactical considerations in the legislative process makes it always dangerous to impute a new meaning to a previously enacted statute from the choice of a later Congress *not* to amend that legislation. "Ordinarily, and quite appropriately, courts are slow to attribute significance to the failure of Congress to act on particular legislation." *Bob Jones University v. United States*, 461 U.S. 574, 600 (1983).

that the bill's sponsors pointed to the last sentence of § 706(g) as proof that the remedies under Title VII were to be victim-specific.

This Court's decisions to date have been faithful to the victim-specific remedial scheme intended by Congress. And those decisions leave no room for the issuance of judicial quotas under the label "class wide, race-conscious relief" advocated in the *Stotts* dissent.

a) As this Court has consistently recognized, Title VII provides protection to individuals, not to races as such. The language both of the provision defining unlawful conduct (§ 703) and of the remedial provision (§ 706(g)) focuses expressly on protecting the "*individual*" from unlawful discrimination in employment. In *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978) this Court stated:

> The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual or national class . . . Even a true generalization about a class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.

In *Connecticut v. Teal*, 457 U.S. 440, 453-454 (1982), the point was repeated:

> The principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole. Indeed, the entire statute and its legislative history are replete with references to protection for the individual employee. See, *e.g.*, §§ 703(a)(1), (b), (c) . . . .

And in *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983), this point was reiterated in each of the opinions. *Id.* at 1083-1086 (Opinion of Justice Marshall); *id.* at 1103 (Opinion of Justice Powell); id. at 1108 (Opinion of Justice O'Connor).

(b) Precisely because Title VII's focus is on the individual and not the racial class, this Court has recognized that in determining the appropriate remedy for a

Title VII violation—whether in an individual or a class action—relief must be limited to making whole individuals who have suffered discrimination by the defendant. Individuals whose claim to an entitlement to relief is that they are members of the same minority group as the victims, but who have not suffered from such discrimination, are already in the position they would have occupied in the absence of the defendant's discriminatory conduct and accordingly are not entitled to a court order that improves their position.

Thus, in *Franks v. Bowman Transportation Co.*, the Court drew the line as to the scope of permissible remedy between make-whole relief for "actual victims of racial discrimination" (424 U.S. at 772), which is permitted, indeed virtually required, and relief for nonvictims of such discrimination, which is not permitted. In *Franks*, the Court stated that the federal courts "are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victims of racial discrimination in hiring." 424 U.S. at 764. And the Court made clear that members of the plaintiff class in *Franks* who were found *not* to be actual victims of the defendant employer's discrimination—*viz.*, who were "not in fact discriminatorily refused employment as an OTR driver" (*id.* at 773 n.32)—would not be entitled to any equitable relief. *Id.* at 772-773, and n.32. Then, in *Teamsters*, the Court analyzed at length the question of how to determine whether a claimant for relief is an actual victim of the litigated violation and thus eligible for relief. 431 U.S. at 356-377.[11] That lengthy discussion in *Teamsters*

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[11] Under *Franks* and *Teamsters*, when a class violation of hiring discrimination is proven, the burden of proof shifts to the defendant to establish that individual members of the class who applied for the position or positions in question were not actually victims of the violation. This shift in the burden of proof, far from authorizing relief to nonvictims, simply determines how the court is to decide whether a given individual was a victim of discrimination and is thus entitled to relief. Members of the class against whom the unlawful practice was committed—*e.g.*, black applicants for jobs

would have been pointless if courts were empowered under Title VII to provide remedies to nonvictims.[12]

(c) This Court has also recognized that Title VII imports general principles of equity which may limit the remedial powers of courts even when the remedy is directed solely to victims of discrimination, and which certainly would preclude extending a preferential remedy to nonvictims at the expense of other innocent employees.

In the context of competitive hiring and promotion decisions, the Court has recognized that even a remedy designed only to make the victims of discrimination whole has a heavy cost: where a court order confers upon the individual who was a victim of the employer's wrong an improved competitive status with respect to a job, some employee who was not in any respect responsible for the employer's wrong is of necessity disadvantaged. A majority of the Court in *Franks* determined

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from an employer who has been proved to have had an across-the-board practice of refusing to hire blacks—are presumed to be victims, unless the defendant proves otherwise. *Franks*, 424 U.S. at 772 n.32; *Teamsters*, 431 U.S. at 357-362.

[12] This Court's school desegregation decisions follow precisely the same remedial principle: " 'to restore the victims of discriminatory conduct to the positions they would have occupied in the absence of such conduct.' " *Milliken v. Bradley*, 433 U.S. 267, 280 (1977) ("*Milliken II*"). In school cases, the violation generally consists of practices intentionally maintained by a school board for the purpose of segregating the races. All minority students subjected to such practices are victims of the violation. To make such victims whole may require both the "dismantling" of the discriminatory practices and the affirmative correction of education deficiencies which resulted from those practices. *Milliken II*, 433 U.S. at 282-283; *Swann v. Bd. of Educ.*, 402 U.S. 1, 26, 31-32 (1971). In that context, for example, make-whole relief may require that a "dual system" be dismantled, which may in turn require such actions as race-conscious assignment policies for teachers and pupils alike. But, in that context, too, this Court has been careful to confine remedial decrees to the make-whole purpose, and has not permitted such decrees to be used to achieve goals, such as racial balancing, beyond that purpose. *Swann*, 402 U.S. at 15-16, 31-32; *Pasadena City Bd. of Education v. Spangler*, 427 U.S. 424, 435-437 (1976); *Dayton Board of Education*, 433 U.S. 406, 419-420 (1977).

that it is consistent with equity for the innocent employee to be disadvantaged so that the victim can be made whole. 424 U.S. at 776-779; compare *id.* at 780-781 (Opinion of Chief Justice Burger) and *id.* at 787-793 (Opinion of Justice Powell.) But the majority recognized that there might be circumstances in which considerations of equity would dictate limiting the relief out of concern for the innocent employee. *Id.* at 779-780 & n. 41.

In *Teamsters*, after making it clear that nonvictims have no entitlement to a remedy of competitive seniority, 431 U.S. at 367-372, the Court stated that equitable balancing is required even in determining remedies for *victims*:

> [A]*fter the victims have been identified and their rightful place determined*, the District Court will . . . be faced with the delicate task of adjusting the remedial interests of discriminatees and the legitimate expectations of other employees innocent of any wrongdoing. [431 U.S. at 372 (emphasis added).]

In *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982), the Court disapproved as inequitable a remedy that would have encouraged employers to give competitive seniority advantage to persons who *claim* they are victims of discrimination but whose claims have not yet been adjudicated:

> . . . Title VII . . . permits us to consider the rights of "innocent third parties." *City of Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 723 (1978). See also *Teamsters v. United States*, 432 U.S. 324, 371-376 (1977). The lower court's rule places a particularly onerous burden on the innocent employees of an employer charged with discrimination. Under the court's rule, an employer may cap backpay liability only by forcing his incumbent employees to yield seniority to a person who has not proven, and may never prove, unlawful discrimination . . . .
>
> The sacrifice demanded by the lower court's rule, moreover, leaves the displaced workers without any remedy against claimants who fail to establish their

> claims. If, for example, layoffs occur while the Title VII suit is pending, an employer may have to furlough an innocent worker indefinitely while retaining a claimant who was given retroactive seniority. If the claimant subsequently fails to prove unlawful discrimination, the worker unfairly relegated to the unemployment lines has no redress for the wrong done him. We do not believe that the " 'large objectives' " of Title VII, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975) (citation omitted), require innocent employees to carry such a heavy burden. [458 U.S. at 239-240.]

Where, as in the instant cases, a court is asked to direct that a nonvictim of discrimination be given a job instead of an innocent employee of a different race, solely because the nonvictim is of the same race as other persons who were actually discriminated against, there is not the competition of legitimate interests that calls into play equitable discretion. To give the nonvictim the job is not to "restore [him to his] rightful place" (*Teamsters*, 431 U.S. at 375)—he was not wrongfully deprived of that place in the first instance. On the other hand, the "innocent worker" deprived of a job would have had a "wrong done him." *Ford Motor Co.*, 458 U.S. at 240.

II. RACIAL QUOTA REMEDIES ARE NOT AUTHORIZED FOR VIOLATIONS OF 42 U.S.C. § 1981

The question whether courts may impose racial quotas benefiting nonvictims at the expense of innocent persons upon finding a violation of 42 U.S.C. § 1981 was not addressed in *Stotts*, see 104 S.Ct. at 2590, n. 16, but arguably is presented here in No. 84-1999 (see p. 1, n. 1 *supra*). As in the case of Title VII, the question is strictly one of statutory interpretation.

Section 1981 provides in pertinent part:

> All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 1981 forbids racial discrimination in private as well as public employment, *Johnson v. Railway Express Agency*, 421 U.S. 454 (1985), and protects whites equally with blacks against such discrimination, *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 285-96 (1976).

1. Analysis of the permissible scope of judicial remedies properly begins with the nature of the substantive right that Congress sought to vindicate. It is difficult to conceive of a statutory command to which quota "remedies" according preference to nonvictims on the basis of race would be more antithetical than the command of § 1981. If one or more persons are denied "the same right . . . to make and enforce contracts," it is plain that the court is empowered to make the victims whole for that deprivation and assure that the wrong is not repeated. But for a court to impose a quota that would run to the benefit of other persons who were *not* victims of a violation of § 1981, and that would extend them a preference based solely on their race over others who have done no wrong, would be to visit the very injustice against which § 1981 was directed. The innocent white would be deprived of "the same right" to make contracts as the nonvictim black; and the judicially-ordered racial preference would violate the statute's command that "all persons" are to "be subject to like punishment, pains, penalties . . . and exactions of every kind, *and to no other*" (emphasis added).

The remedial power of a court sitting in equity is not unlimited. *Swann v. Board of Education*, 402 U.S. 1, 31 (1971); *Hills v. Gautreaux*, 425 U.S. 284, 294 (1976); *Pasadena City Bd. of Education v. Spangler*, 427 U.S. 424, 434 (1976). Cf. *Hecht v. Bowles*, 321 U.S. 321, 329-330 (1944). Foremost among the applicable limitations is that "the scope of the remedy is determined by the nature and extent of the . . . violation." *Milliken v. Bradley*, 418 U.S. 717, 744 (1974) (*Milliken I*); see also, e.g., *Swann*, 402 U.S. at 16; *Milliken v. Bradley*, 433 U.S. 267, 280 (1977) (*Milliken II*): "Rights, constitutional or otherwise, do not exist in a vacuum. Their

purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect," *Carey v. Piphus*, 435 U.S. 247, 254 (1978). The remedies fashioned for deprivation of those rights "should be tailored to the interests protected by the particular rights in question" (*id.* at 259). The task of the equity court "once a . . . violation is found, . . . is . . . to tailor 'the scope of the remedy' to fit 'the nature and extent of the . . . violation.'" *Hills*, 425 U.S. at 294; see also *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 420 (1977). And this Court has defined with precision the way in which the remedy must relate to the violation: "the decree must indeed be remedial in nature, that is, it must be designed as nearly as possible 'to restore the *victims* of discriminatory conduct to the position they would have occupied in the absence of such conduct.'" *Milliken II*, 433 U.S. at 280 (emphasis added); see also *Milliken I*, 418 U.S. at 76. See p. 18 n. 12, *supra*.

Thus, in assessing whether a remedial decree has exceeded proper limits, it is critical to know what is the violation being remedied, who are the victims, and how has the violation affected the victims. Section 1981 is designed to protect individuals from discrimination on the basis of race; it is not intended to mandate racial balance or the achievement of particular proportions of the races in a given workforce. In the words of one of its sponsors, § 1981 "is not for any race or color . . . but . . . will, if it become[s] a law, protect every citizen . . ." (quoted in *McDonald v. Santa Fe*, *supra*, 427 U.S. at 295). And, this Court has held that § 1981 does not reach "practices that merely result in a disproportionate impact on a particular class . . ." *General Building Contractors Association v. Pennsylvania*, 458 U.S. 375, 386 (1982).

It follows from what we have shown thus far that under § 1981 the individuals who have suffered discrimination by the defendant—the victims—are the ones entitled to be made whole. Individuals whose claim to an

entitlement to relief is that they are members of the same racial group as the victims, but who have not suffered from such discrimination, are already in "the position they would have occupied in the absence of [the defendant's discriminatory] conduct," *Milliken II*, 433 U.S. at 280, and are not entitled to a court order that improves their position—an order that would yield them "a windfall, rather than compensation," *Carey v. Piphus*, 435 U.S. at 260.

That would be the case even if an award to nonvictims would not harm innocent third parties. But in employment discrimination cases such as these, where relief that benefits nonvictim blacks necessarily deprives innocent whites of employment opportunities, it is all the more clear that "the 'historic power of equity'" (*Albemarle Paper Co., v. Moody*, 422 U.S. 405, 416 (1975)) does not countenance such relief. That is the teaching of this Court's analysis of the competing equities at issue in *Franks*, *Teamsters*, and *Ford* (see pp. 17-20 *supra*); and that teaching is equally applicable under § 1981. Thus, to hold that quota remedies are available under § 1981 would require the conclusion that the post-Civil War Congress intended to authorize the courts to prescribe a form of relief which, under long-established principles of equity, is an inappropriate remedy for a violation of the rights Congress created in that statute. There is no basis for such a conclusion. Not only were such remedies unheard of at the time § 1981 was enacted (indeed, for a century thereafter), but they would be antithetical to the very values enshrined in § 1981.

2. Analysis of the courts' remedial authority in § 1981 actions is not complete without consideration of 42 U.S.C. § 1988. Section 1988 was enacted at the same time as § 1981 and applies to suits brought pursuant to § 1981. Section 1988 does not itself specify remedies for § 1981 actions. But § 1988 does state that in § 1981 suits courts will enforce their jurisdictions "in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect"; only if "the laws of

the United States . . . are not adapted to the object [of § 1981], or are deficient in the provisions necessary to furnish suitable remedies," may the courts apply "the common law, as modified and changed by the constitution and statutes of the States wherein the court having jurisdiction of such . . . cause is held . . . ." 42 U.S.C. § 1988.

In *Smith v. Wade*, 461 U.S. 30 (1983), a closely-divided Court stated—presumably on the basis of § 1988—that the remedies available in a § 1983 action are not necessarily fixed at those that could have been within the contemplation of the Congress that enacted § 1983, explaining that "if the *prevailing view* on a point of . . . law has changed substantially in the intervening century . . . we might be highly reluctant to assume that Congress intended to perpetuate a *now-obsolete* doctrine." *Id.* 34, n.2 (emphasis added); but see, *id.* at 65-66 (Rehnquist, J., dissenting); *id.* at 92-93 (O'Connor, J., dissenting). Assuming that the same approach would prevail in § 1981 actions, that approach would only strengthen the view that quota remedies are impermissible in such actions. For that approach would lead directly to the determination of the modern Congress, in enacting Title VII, to forbid racial quota remedies.

In the intervening century between enactment of § 1981 and enactment of Title VII there was no evolution making quota remedies the "prevailing view" or their refusal an "obsolete doctrine." Indeed, at the time Congress was debating Title VII in 1964, quota remedies were non-existent, a point cited by the sponsors of Title VII as proof that such remedies would not result under Title VII.[13] Racial quotas have emerged subsequent to

[13] See, *e.g.*, 110 Cong. Rec. 6991 (Sen. Humphrey, explaining that quota remedies have not eventuated under State FEPC laws); *id.* at 7000 (colloquy between Senators Humphrey and Smathers in which they agree that no State has ordered quotas under its FEPC law); *id.* at 8921 (Sen. Williams of New Jersey explaining that quota remedies have not been issued in cases finding racial discrimination in the selection of juries). The opponents of Title VII had

1964 only in lower court orders that have misapplied the congressional will in Title VII cases.

Moreover, it is surely pertinent in applying § 1988 that when Congress first addressed the propriety of quota remedies—during consideration of Title VII—it set its face squarely against them. While the precise product of the 1964 debates was a determination that quota remedies would not be authorized under Title VII (see part I, *supra*), that result does not reflect simply a choice not to add a particular remedy to the arsenal of powers afforded the judiciary for enforcement of that particular statute (as is the case, for example, in the judgment to provide only equitable relief (including backpay), and not compensatory or punitive damages, under Title VII). Rather, the decision not to authorize quota remedies reflects a congressional determination that governmentally-imposed quota remedies are antithetical to the very values upon which Title VII is premised. In the words of the Clark-Case materials, quota remedies were not being authorized in Title VII because "[q]uotas are themselves discriminatory" (110 Cong. Rec. 7218).[14] See also, Senator Humphrey's repeated declarations that he would "vote against" Title VII if it authorized quota remedies, (*id.* at 5092), that such remedies were a "bugaboo" and the "very opposite" of what Title VII was attempting to achieve (*id.* at 6548; *see also*, *id.* at 11847), and that "I do not believe in a quota system" (*id.* at 7800). And see, to the same effect, 110 Cong. Rec. 8500, 9881 (Sen. Allott); *id.* at 9113 (Sen Keating).

raised the spectre of quota remedies not because there was a backdrop of judicial quota remedies in other contexts—there was not—but because they feared that the then-incumbent administration would champion them, as "evidenced by numerous Executive orders, other administrative actions and statements of officials in the executive branch of the Federal Government." H.R. Rep. No. 914, 88th Cong. 1st Sess. 64, 68 (1963) (Minority Report).

[14] This theme appeared throughout the Clark-Case materials. See, e.g., 110 Cong. Rec. 7207 (Dept. of Justice letter); *id.* at 7213 (Clark-Case interpretative memorandum). See *supra*, p. 6 n. 4.

Given that §§ 1981 and 1988 had not been construed to authorize quota remedies prior to 1964, and that Congress in that year, upon first addressing the propriety of racial quotas, adjudged them antithetical to the principle of equal employment opportunity, it would be inappropriate to import them through subsequent judicial interpretation of §§ 1981 and 1988. Courts should not be free effectively to circumvent the judgment of the Congress that enacted Title VII by imputing to the Congress that enacted §§ 1981 and 1988, without a basis in the legislative materials, an "intent" to allow quota remedies.

3. Even without the express command of § 1988 that resort be had to other federal laws, the principle that general legislation should not be interpreted by the courts to achieve results inconsistent with the clear intent of Congress manifested in later, more specific legislation would point to the same result. In *Labor Board v. Drivers Local Union*, 362 U.S. 274 (1960), for example, the NLRB had construed Section 8(b)(1)(A) of the NLRA, 29 U.S.C. § 158(b)(1)(A)—which in general terms makes it an unfair labor practice for a union "to restrain or coerce" employees in the exercise of their Section 7 rights—to outlaw all recognitional picketing. This Court reversed, relying in part upon the fact that when Congress *later* focused *specifically* on recognitional picketing it outlawed only certain forms of such picketing:

> To be sure, what Congress did in 1959 does not establish what it meant in 1947. However, as another major step in an evolving pattern of regulation of union conduct, the 1959 Act is a relevant consideration. Courts may properly take into account the later Act when asked to extend the reach of the earlier Act's vague language to the limits which, read literally, the words might permit. We avoid the incongruous result implicit in the Board's construction by reading § 8(b)(1)(A), which is only one of many interwoven sections in a complex Act, mindful of the manifest purpose of the Congress to fashion a coherent national labor policy. [362 U.S. at 291-92].

See also, *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 193-95 (1967); *Hunter v. Erickson*, 393 U.S. 385, 388 (1969). The language of §§ 1981 and 1988 is not so "vague" as even to be "read literally" to authorize quota remedies. But even if it were, the principle just quoted would dictate against such remedies, particularly where, as here, what is at issue is the proper exercise of the courts' equity powers. For it can hardly be equitable for a court to award under § 1981 the very relief that Congress denounced as unjust when it enacted Title VII.[15]

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[15] We recognize that this Court has "generally conclude[d] . . . that the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent." *Johnson v. Railway Express Agency*, 421 U.S. 454, 461 (1975). But while it follows that remedies are not foreclosed for § 1981 violations simply because they are not authorized for Title VII violations (e.g. compensatory and punitive damages, *id.* at 460), it does not follow that under § 1981 courts may award remedies that Congress concluded in enacting Title VII were a positive evil. A too-rigid adherence to the independence of § 1981 from Title VII could lead, for example, to the invalidation of seniority systems that Congress acted affirmatively to "protect" in Title VII (see, e.g., *Johnson v. Ryder Truck Lines, Inc.*, 575 F.2d 471, 474-75 (4th Cir. 1978), *cert. denied*, 440 U.S. 979 (1979); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1191 n.37 (5th Cir. 1977), *cert. denied*, 439 U.S. 1115 (1979)), or, as here, to the erosion of other values that a contemporary Congress has adopted as the policy of our nation.

A useful analogy is furnished by this Court's treatment of 42 U.S.C. § 1982, which was enacted as part of the same statute as § 1981. In *Jones v. Mayer Co.*, 392 U.S. 409, 416 (1968), this Court declared that "[t]he Civil Rights Act of 1968 does not mention 42 U.S.C. § 1982, and we cannot assume that Congress intended to effect any change, either substantive or procedural, in the prior statute." One year later, the Court ruled, in *Hunter v. Erickson*, 393 U.S. at 388:

> The 1968 Civil Rights Act specifically preserves and defers to local fair housing laws, and the 1866 Civil Rights Act considered in *Jones* should be read together with the later statute on the same subject, *U.S. v. Stewart*, 311 U.S. 60, 64-65 (1940); *Tablot v. Seeman*, 1 *Cranch*. 1, 34-35 (1801), so as not to pre-empt the local legislation which the far more detailed Act of 1968 so explicitly preserves.

III. RACIAL QUOTA REMEDIES ARE NOT AUTHORIZED IN ACTIONS BROUGHT UNDER 42 U.S.C. § 1983

In the case of public employers, racial discrimination also violates the Fourteenth Amendment and is actionable under 42 U.S.C. § 1983. This Court did not address in *Stotts* whether quota remedies are available in § 1983 actions, see 104 S.Ct. at 2590, n.16.

Just as in the case of § 1981, suits brought under § 1983 are subject to the provisions of § 1988. And, like Title VII and § 1981, the rights enforced in a § 1983 action are the rights of *individuals* to be free of racial discrimination. Section 1983 by its terms protects "any citizen . . . or other person within the jurisdiction"; transgressors incur liability "to the party injured." See, e.g., *Wilson v. Garcia*, —— U.S. ——, 105 S.Ct. 1938, 1948 (1985). And the Fourteenth Amendment itself—the source of the right to be free of racial discrimination enforceable under § 1983—is, like Title VII, designed to protect individuals. As this Court stated in *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948):

> [T]he rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.

See also *Castaneda v. Partida*, 430 U.S. 482, 499-500 (1977); *University of California Regents v. Bakke*, 438 U.S. 265, 299 (1978) (Opinion of Justice Powell.)

And, this Court repeatedly has held that the Fourteenth Amendment, whether sued on directly or through § 1983, does not prohibit official conduct simply because that conduct has a greater adverse effect on racial or ethnic minority *groups* than on majority *groups*. In *Washington v. Davis*, 426 U.S. 229, 239 (1976), the

Court held that "a racially neutral qualification for employment is [not] discriminatory . . . simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups." *Id.* at 245. "That other Negroes also failed to score well would, alone, not demonstrate that [plaintiffs] *individually* were being denied equal protection of the laws . . ." *Id.* at 246 (emphasis added). See also, *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264-265 (1977); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 272 (1979).

With these similarities established, the analysis we have heretofore provided with respect to § 1981 is equally applicable to suits brought under § 1983. The "historic power of equity" no more warrants judicial dispensation of racial preferences to nonvictims over other innocent persons in § 1983 actions than in § 1981 actions.[16]

[16] Of course, given that § 1983 furnishes a cause of action to enforce *constitutional rights* it is arguable that the courts in § 1983 actions have the power to issue remedies beyond those authorized by Congress. That power of course would remain circumscribed by the basic principle of equity that "the scope of the remedy is determined by the nature and extent of the violation." See cases cited *supra* at pp. 21-22. And even if the courts were somehow released from that limitation, it would not follow that Congress' judgments about what remedies are appropriate, and what inappropriate, are to be disregarded in fashioning relief for constitutional violations. Thus, even assuming *arguendo* that the federal courts have *power* in constitutional cases to enter quota remedies compelling the subordination of the interests of innocent employees of one race to advantage nonvictims of another race, the congressional judgment that such remedies are inappropriate is entitled to weight in the courts' determination whether that power should be exercised. In *Bush v. Lucas*, 462 U.S. 367 (1983), for example, where the petitioner sought "a new nonstatutory damages remedy for federal employees whose First Amendment rights are violated by their superiors" (*id.* at 368), this Court declined to adopt this remedy, explaining:

> Because such claims arise out of an employment relationship that is governed by comprehensive procedural and substantive remedies . . . we conclude that it would be inappropriate for us

CONCLUSION

For the reasons set forth above, the decisions of the courts of appeals in these cases should be reversed.

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to supplement that regular scheme with a new judicial remedy. [*Ibid.*]

This Court did not question its "power [in suits arising directly under the Constitution] to grant relief that is not expressly authorized by statute" (*id.* at 373), but concluded that the circumstances warranted no departure from its predisposition that "such power is to be exercised in the light of relevant policy determinations made by the Congress" (*ibid.*). The Court ultimately answered in the negative the question "whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by a new judicial remedy for the constitutional violation at issue." *Id.* at 388.

APPENDIX

APPENDIX

Additional Statements of Proponents of the Bill That Became the Civil Rights Act of 1964 Respecting the Availability of Quota Remedies under Title VII

The Republican sponsors of Title VII in the House, in their "Additional Views" to the House Judiciary Report, declared:

> It must also be stressed that the [Equal Employment Opportunity] Commission must confine its activities to correcting abuse, not promoting equality with mathematical certainty. In this regard, nothing in the title permits a person to demand employment. Of greater importance, the Commission will only jeopardize its continued existence if it seeks to impose forced racial balance upon employers or labor unions.[1]

Senator Clark, one of the bipartisan "captains" for Title VII, declared in his principal speech describing Title VII: "The suggestion that racial balance or quota systems would be imposed by this proposed legislation is entirely inaccurate."[2] At the conclusion of his speech he introduced a Justice Department letter that stated:

> There is no provision, either in title VII or in any other part of the bill, that requires or authorizes any Federal agency or Federal court to require preferential treatment for any individual or any group for the purpose of achieving racial balance . . .[3]

Senator Humphrey, responding to a political advertisement opposing enactment of Title VII, stated on the floor of the Senate:

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[1] H. Rep. No. 914, *supra*, at 150.

[2] 110 Cong. Rec. 7207.

[3] *Id.* at 7207.

> [N]othing in the bill would permit any official or court to require any employer or labor union to give preferential treatment to any minority group.[4]

And, responding to a charge by Senator Smathers that Title VII would lead to employment quotas, Senator Humphrey declared:

> The quota system which has been discussed is nonsense. Everybody knows that it is not in the bill, and that where there are State FEPC laws, it is not the pattern.
>
> . . . The only thing that the court would do would be to ask the defendant to cease and desist, to tell him to stop this practice, if it can be proved that the practice has been unlawful.[5]

Senator Humphrey, in an extended colloquy with Senator Robertson, made the following remarks:

> I feel sure that the Senator from Virginia is not going to suggest or intimate that under this title of the bill there would be such a thing as a quota or a required percentage.
>
> • • •
>
> [C]an the Senator from Virginia point out in title VII any section or subsection or provision that would indicate that in connection with the elimination of the segregation in employment based on color, race, religion or national origin an employer would be required to hire any member of a certain ethnic group?
>
> • • •
>
> I would like to make an offer to [the Senator]. If the Senator can find in title VII . . . any language which provides that an employer will have to hire on the basis of percentage or quota related to color, race, religion, or national origin, I will start eating

[4] *Id.* at 5423.

[5] *Id.* at 6091.

> the pages one after another, because it is not in there.[6]

Senator Allott, one of the Republican sponsors of the bill, in another colloquy with Senator Smathers, expressed his disapproval of governmentally-imposed quotas:

> I completely agree with the Senator that if an employer were required to employ a person on the basis of a quota, there would be no justification for that procedure under the American system . . .
>
> • • •
>
> The only point I wish to make is that if anyone sees in the bill quotas or percentages, he must read that language into it. It is not in the bill.[7]

Senator Williams of New Jersey, declaring that "there is nothing whatever in the bill that provides for racial balance or quotas in employment," cited as proof of this proposition that courts did not enter quotas remedies upon finding racial discrimination in the selection of juries.[8]

Senator Keating, in a colloquy with Senator Sparkman, secured the latter's agreement that "the bill does not provide in any way for quotas of any kind."[9] Senator Keating later declared, in response to a public advertisement that the bill would require quotas:

> The coordinating committee has charged . . . that Title VII would . . . permit the Government to impose quotas and preferences upon employers and labor organizations in favor of minority groups . . .
>
> Title VII does not grant this authority to the Federal Government . . .

[6] *Id.* at 7419-20.

[7] *Id.* at 8500-01.

[8] *Id.* at 9321.

[9] *Id.* at 9619.

An employer or labor organization must first be found to have practiced discrimination before a court can issue an order to prohibit further acts of discrimination in the first instance. Adequate administrative and judicial procedures have been provided in the title to assure that an order of court is only founded upon clear and conclusive evidence of discrimination. For the Commission to request or a court to order preferential treatment to a particular minority group would clearly be inconsistent with the guarantees of the Constitution.[10]

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[10] *Id.* at 9113.

AMICUS CURIAE

BRIEF

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84-1999

Nos. 84-1656 and 84-1999

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, *et al.*,
Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*,
Respondents.

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, C.L.C.,
Petitioner,

v.

CITY OF CLEVELAND, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Second and Sixth Circuits

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BRIEF OF LOCAL 542, INTERNATIONAL UNION OF OPERATING ENGINEERS AND LOCAL 35, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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BRIEF OF LOCAL 542, INTERNATIONAL UNION OF OPERATING ENGINEERS AND LOCAL 36, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICI CURIAE

Local 542, International Union of Operating Engineers, is the exclusive bargaining representative for all unionized operating engineers in Eastern Pennsylvania and Delaware. Local 36, International Association of Firefighters, AFL-CIO, is the exclusive bargaining representative for all members of the uniformed force of the District of Columbia Fire Department in the ranks of Firefighter through Captain. Each of these amici is presently involved in litigation concerning the legitimacy of court-ordered or governmentally imposed racial quotas in the employment context. See *Local Union 542, International Union of Operating Engineers v. Commonwealth of Pennsylvania, et al.*, *pet. for cert. pending*, No. 85-828; *Hammon v. Barry*, 606 F. Supp. 1082 (D.D.C. 1985). The principles by which this Court decides the instant cases may well determine the validity or invalidity of the racial quotas at issue in amici's cases. Amici file this brief amici curiae with the consent of the parties as provided for in the Rules of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This brief addresses only the question whether courts are authorized to order racial quotas as remedies for employment discrimination found to violate Title VII of the Civil Rights Act of 1964 or 42 U.S.C. §§ 1981 or 1983.[1] More specifically, the question is whether under

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[1] The petitions in these cases do not expressly raise any question regarding the authority of courts to order racial quotas as remedies for violations of §§ 1981 or 1983. However, in No. 84-1999 *(Local Number 93)* the complaint was premised on §§ 1981 and 1983 as well as Title VII, and presumably so was the consent decree containing the racial quotas. Accordingly, in No. 84-1999 the Court

these statutes a court may order that persons of one race be deprived of jobs, solely because of their race, in order to open those jobs to persons of another race who have not been victims of the discrimination practiced by the defendant.

This brief will examine the pertinent legislative history of Title VII and show the following: (1) In 1964, when the law was enacted, Congress expressly determined that courts would not be authorized to order racial quotas; (2) in 1972, when certain provisions of Title VII were amended, Congress exhibited full awareness of its earlier decision to prohibit court-ordered racial quotas, and determined not to alter that decision.

With respect to the remedial authority of courts in actions brought under §§ 1981 or 1983, we will show: that the post-Civil War Congress that enacted those provisions—as well as the companion provision, 42 U.S.C. § 1988—did not intend to authorize quota remedies; and that, if those provisions are to be interpreted in light of "modern law," the judgment of Congress to prohibit court-ordered quotas under Title VII precludes courts from construing the post-Civil War statutes to reach a contrary result.

ARGUMENT

I. TITLE VII DOES NOT AUTHORIZE COURTS TO AWARD RACIAL QUOTA REMEDIES

In *Firefighters Local Union No. 1784 v. Stotts*, —— U.S. ——, 104 S.Ct. 2576, 2588-89 (1984), this Court stated that "the policy behind § 706(g) of Title VII . . . . is to provide make-whole relief *only* to those who have been actual victims of illegal discrimination . . ." (emphasis added), and that the quota before the Court in *Stotts* "runs counter" to that policy (*id.* at 2580, n. 17). Section 706(g) is *the* provision that creates and establishes the limits of the remedial power of the courts under Title VII. There has been considerable doubt expressed in the lower courts as to whether the *Stotts* Court meant to preclude racial quotas as remedies for Title VII violations.[2] We do not propose here to debate what this Court intended in *Stotts*. For the question of the power of the courts to order racial quotas as remedies for Title VII violations is purely one of statutory interpretation. And, examination of the relevant legislative materials from 1964 and 1972 establishes that Congress left no doubt as to *its* intention on this question: Congress intended to preclude courts from ordering racial quota remedies in Title VII cases.

1. When Congress considered Title VII in 1964, the issue whether courts would be authorized to order racial quota remedies was expressly addressed. The sponsors of the bill in both the House and the Senate repeatedly and unequivocally confirmed that Title VII would not empower courts to order racial quota remedies.

Before the 1964 debate began, the bill's opponents cited quota remedies as one of the evils that would be produced. See, *e.g.*, H.R. Rep. 914, 88th Cong. 1st Sess. (1963) at 72. These opponents declared this "a not too subtle system of racism-in-reverse" (*id.* at 73).

When the bill reached the House floor, the opening speech in support of its passage was delivered by Repre-

---

may address the validity of racial quota remedies for violations of §§ 1981 or 1983. The question of the validity of quota remedies under § 1981 is directly presented in the petition for certiorari filed by amicus Local 542 in *Local Union 542, International Union of Operating Engineers v. Commonwealth of Pennsylvania, et al.*, No. 85-828.

[2] See, *e.g.*, *Commonwealth of Pennsylvania v. Local Union 542, International Union of Operating Engineers*, 770 F.2d 1068 (3d Cir. 1985) (table) (opinion published at 38 FEP Cases 673), *pet. for cert. pending*, No. 85-828; *Paradise v. Prescott*, 767 F.2d 1514, 1529-1530 (11th Cir. 1985); *Desvarieux v. Goerg*, 765 F.2d 268, 272 (1st Cir. 1985); *Turner v. Orr*, 759 F.2d 817, 823-824 (11th Cir. 1985), *pet. for cert. pending*, No. 85-177; *Britton v. South Bend Community School Corp.*, —— F.2d ——, 39 FEP Cases 176, 180-181 (7th Cir. 1985); *Diaz v. American Telephone & Telegraph*, 752 F.2d 1356, 1360 n.9 (9th Cir. 1985) (dictum).

sentative Celler, the Chairman of the House Judiciary Committee. A portion of that speech was devoted to answering the "unfair and unreasonable criticism" that had been leveled against the bill (110 Cong. Rec. 1518):

> In the event that wholly voluntary settlement proves to be impossible, the Commission could seek redress in the federal courts, but it would be required to prove in the court that the particular employer involved had in fact, discriminated against one or more of his employees because of race, religion or national origin . . .
>
> *Even then, the court could not order that any preference be given to any particular race, religion or other group but would be limited to ordering an end to discrimination.* [*Ibid* (emphasis added)].[5]

Subsequent to the House's passage of the bill, the Republican sponsors in the House published a memorandum describing the bill as passed. In pertinent part, the memorandum stated:

> Upon conclusion of the trial, the federal court may enjoin an employer or labor organization from practicing further discrimination and may order the hiring or reinstatement of an employee or the acceptance or reinstatement of a union member. *But, Title VII does not permit the ordering of racial quotas* in businesses or unions and does not permit interference with seniority rights of employees or union members. [*Id.* at 6566 (emphasis added)].

When the bill was taken up by the Senate, Senators Humphrey and Kuchel, the co-managers of the entire bill, undertook a description of each of the titles. In the course of his description of Title VII, Senator Humphrey detailed the manner in which discrimination claims could be processed through suit and finding of discrimination, and then described the remedial powers available to a court:

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[5] *See also id.* at 1409 (Rep. Minish) ("no quota system will be set up").

> The relief sought in such a suit would be an injunction against future acts or practices of discrimination, but the Court could order appropriate affirmative relief, such as hiring or reinstatement of employees and payment of backpay. This relief is similar to that available under the National Labor Relations Act in connection with the unfair labor practices, 29 United States Code 160(b). No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of Section 707e [enacted, without change, as § 706(g)] . . . .
>
> • • •
>
> *Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require hiring, firing, or promotion of employees in order to meet a racial 'quota' or to achieve a certain racial balance.*
>
> *That bogeyman has been brought up a dozen times; but it is nonexistent.* [*Id.* at 6548 (emphasis added).]

Senator Kuchel made the other major opening speech in support of the bill. He, too, took pains to demonstrate that the remedial provisions would not permit court-ordered quotas:

> Title VII might justly be described as a modest step forward. Yet it is pictured by its opponents and detractors as an intrusion of numerous Federal inspectors into our economic life. These inspectors would presumably dictate to labor unions and their members with regard to job seniority, seniority in apprenticeship programs, racial balance in job classifications, racial balance in membership, and preferential advancement for members of so-called minority groups. Nothing could be further from the truth. I have noted that the Equal Employment Opportunity Commission is empowered merely to investigate specific charges of discrimination and attempt to

> mediate or conciliate the dispute. It would have no authority to issue orders to anyone. Only a Federal court could do that, and only after it had been established in that court that discrimination because of race, religion, or national origin had in fact occurred. Any order issued by the Federal district court would, of course, be subject to appeal. *But the important point, in response to the scare charges which have been widely circulated to local unions throughout America, is that the Court cannot order preferential hiring or promotion consideration for any particular race, religion, or other group. Its power is solely limited to ordering an end to the discrimination which is in fact occurring.* [*Id.* at 6563 (emphasis added)].

Senators Clark and Case were the bipartisan "captains" of Title VII in the Senate. They prepared and submitted to the Senate an interpretative memorandum[6] which, *inter alia*, made clear that § 706(g) precluded courts from ordering preferential treatment *for* non-victims *of* discrimination:

> No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not discriminated against in violation of this title. This is stated expressly in the last sentence of section [706(g)] . . . [*Id.* at 7214].

Senator Clark also set before the Senate written answers he had prepared to certain "objections" which had been voiced to Title VII. To the objection that Title VII would "require employers to establish quotas for nonwhites in proportion to the percentage of nonwhites in the labor market," the answer was: "Quotas are themselves discriminatory." *Id* at 7218.

Each day during the Senate debates on the Civil Rights bill, the principal Senate sponsors prepared a Bipartisan Civil Rights Newsletter which was hand-delivered to the office of each Senator supporting the bill. Its purpose,

[6] This Court has recognized the "authoritative nature of [this] interpretative memorandum." *Hutto*, 104 S.Ct. at 2589 n.13; *American Tobacco Co. v. Patterson*, 456 U.S. 63, 73 (1982); *Teamsters v. United States*, 431 U.S. 324, 352 (1977).

as explained by Senator Humphrey, was "to keep Senators who are in favor of civil rights legislation informed of our point of view."[7] The April 11, 1964, issue of the Newsletter declared:

> Under title VII, *not even a Court*, much less the Commission, *could order racial quotas or the hiring, reinstatement, admission to membership or payment of back pay for anyone who is not discriminated against in violation of this title.* [*Id.* at 14455 (emphasis added)].

Senator Humphrey introduced an explanation of the House bill which he said had been "read and approved by the bipartisan floor managers of the bill in both houses of Congress." *Id.* at 11847. In pertinent part, the explanation provided:

> The relief available is a court order enjoining the offender from engaging further in discriminatory practices and directing the offender to take appropriate affirmative action; for example, reinstating or hiring employees, with or without back pay . . .
>
> *The Title does not provide that any preferential treatment in employment shall be given to Negroes or to any other persons or groups. It does not provide that any quota systems may be established to maintain racial balance in employment. . . .* The Title does not provide for the reinstatement or employment of a person, with or without back pay, if he was fired or refused employment or promotion for any reason other than discrimination prohibited by the Title. [*Ibid* (emphasis added)].

In addition to the materials just cited which directly and unambiguously relate to the power of courts to order racial quotas as "remedies," the 1964 legislative history is replete with more general statements by proponents of Title VII that racial quotas could not be imposed under Title VII, including numerous statements that

[7] *Id.* at 5662. It is apparent from the numerous references to the Newsletter in the floor debates, that the publication was widely read by Senators. See id. at 5044, 5048, 5079, 7474, 8368, 8912, 9185, 9979, 10422, 12210, 14464.

imposition of racial quotas would run counter to the anti-discrimination principles of the statute. For the convenience of the Court, we set forth a number of these statements in an appendix to this brief. Significantly, we have not found, nor has any advocate of racial quota relief under Title VII ever cited, a single instance in the 1964 legislative history in which any supporter of Title VII suggested that Title VII would provide for or permit court-ordered racial quotas.

2. What was said and done in 1964 shows conclusively that Congress in enacting Title VII intended to provide affirmative remedies for the victims of discrimination but not quota remedies benefiting nonvictims. Nothing Congress has said or done since 1964 provides a basis for reading Title VII, as amended in 1972, differently in this regard from Title VII as originally passed. Examination of the 1972 legislative materials shows: (i) that the only arguably pertinent legislative act in 1972 was designed to confirm that "rightful place" relief for victims is the remedial objective of Title VII, and not to reverse the determination in 1964 to preclude quota remedies; and (ii) that the 1972 Congress—particularly the House—recognized that the 1964 Congress had determined to rule out quota remedies, and had no wish to alter that determination.

a. In 1972, Congress amended the first sentence of § 706(g) to add the words "but is not limited to" and "any other equitable relief as the court deems appropriate" to the specification of remedies already listed in that provision. The only explanation for that amendment is contained in the Section-by Section Analysis that was introduced in both houses:

> Section 706(g)—This subsection is similar to the present section 706(g) of the Act. It authorizes the court, upon a finding that the respondent has engaged in or is engaging in an unlawful employment practice, to enjoin the respondent from such unlawful conduct and order such affirmative relief as may be appropriate including, but not limited to, reinstatement or hiring, with or without backpay, as will effectuate the policies of the Act. Backpay is limited to that which accrues from a date not more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the aggrieved person(s) would operate to reduce the backpay otherwise allowable.
>
> The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination [118 Cong. Rec. 7166, 7168 (emphasis added)].*

As this Court explained in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 764 n.21 (1976), the Congress that "added the phrase speaking to 'other equitable relief' in § 706(g) . . . indicated that 'rightful place' was the intended objective of Title VII and the relief accorded thereunder." And, the Court understood the portion of the Section-by-Section Analysis quoted above to be "emphatic confirmation that federal courts are empowered to fashion such relief as the particular circum-

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* The Section-by-Section Analysis quoted in text was first submitted to the Senate by Senator Williams (the bill's floor manager in the Senate) prior to adoption of the Senate bill. Senator Williams submitted it again in conjunction with the Conference Report, as did Rep. Perkins in the House. *See* Legislative History of the Equal Employment Opportunity Act of 1972, prepared by the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare (Nov. 1972) (hereinafter "'72 L.g. Hist."), pp. xv n.3, 1705, 1773-74, 1843-44, 1849, 1856.

stances of a case may require to effect restitution, making whole insofar as possible the victims of racial discrimination . . ." *Id.* at 764 (emphasis added).

There is not a word in the legislative history to suggest that "other equitable relief" was added to § 706(g) to authorize quota remedies, and it is hardly conceivable that so profound a departure from the anti-quota decision made in 1964 would have been accomplished without evidence of an intention to do so.

b. Not only did the 1972 Congress take no legislative act which purported to reverse the anti-quota decision of 1964, but that Congress also manifested a recognition and an acceptance of the fact that court-ordered racial quota remedies are barred under Title VII.

That recognition and acceptance are most readily seen in the debate in the House. That debate focused on two competing bills—one (H.R. 1746) introduced by Rep. Augustus Hawkins and reported out by the House Labor Committee, and the other (H.R. 9247) offered by Rep. John Erlenborn "as an amendment in the nature of a substitute." 72 Leg. Hist. 130-151. The principal differences between the bills—and the subject of virtually all the debate—involved matters wholly irrelevant to the issue here (*e.g.*, Should the EEOC be given "cease and desist" power? Should Title VII be extended to public employment?). Insofar as relevant here, the difference between the bills was that the Committee bill proposed to transfer administration of Executive Order 11246 from the Department of Labor's Office of Federal Contract Compliance (OFCC) to the EEOC, while the Erlenborn bill did not. The proposed transfer of OFCC administration to the EEOC in the Committee bill was perceived by some as providing the EEOC with a power to order quotas, for the OFCC in its administration of the Executive Order had made it a condition to receipt of government contracts that the contractor adopt "goals and timetables." The discussion of quotas in the House in 1972 centered on the propriety of giving the EEOC

power to require quotas under the Executive Order, with all sides agreeing that quotas could not be ordered under Title VII.

In support of his position that the OFCC administration should not be transferred to the EEOC, Rep. Erlenborn stated the theory on which quotas, although not authorized under Title VII, had been treated differently under the Executive Order:

> The OFCC is an altogether different type of jurisdiction [from the EEOC]. It is not based upon constitutional rights. It is not based upon statutory rights.
>
> The genesis of the power of the OFCC is the contractual relationship that exists between the Federal Government and those with whom they contract for the acquisition of goods and services. In this jurisdiction the OFCC can and does go beyond those powers granted by the 1964 Civil Rights Act. I think it is important to note that the Chairman of the Equal Employment Opportunity Commission himself has testified that you cannot mix these two enforcement authorities. [72 Leg. Hist. at 231].

Supporters of the Committee bill did not dispute the theoretical basis for such a distinction, and they proposed to resolve the dilemma not by leaving administration of the Executive Order with the OFCC, as Rep. Erlenborn would have done, but by making Title VII's ban on quotas equally applicable to the Executive Order. Their solution—incorporated in the so-called Dent Amendment to the Committee bill—was that coincident with transfer to the EEOC of authority to enforce the Executive Order, the EEOC should be "prohibited from imposing or requiring a quot[a] or preferential treatment." 72 Leg. Hist. at 189. Rep. Dent, the floor manager of the Committee bill, explained the reason for incorporating this express prohibition:

> My . . . amendment would forbid the EEOC from imposing *any quotas or* preferential treatment of *any employees* in its administration of the Federal

contract-compliance program. This responsibility, which is now vested in the Office of Federal Contract Compliance of the Department of Labor, would be transferred by H.R. 1746 to the Commission. *Such a prohibition against the imposition of quotas or preferential treatment already applies to actions brought under title VII. My amendment would, for the first time, apply these restrictions to the Federal contract-compliance program.* [72 Leg. Hist. at 190 (emphasis added). See also *id.* at 199 (Rep. Perkins); *id.* at 204, 208 (Rep. Hawkins)].

While there was some debate over the propriety of exacting quotas under the Executive Order as the price for receipt of government contracts (see, e.g., *id.*, at 202, 208-209, 222-223, 231), there was unanimity that quotas were not to be imposed under Title VII. Rep. Hawkins, the author of the Committee bill, declared:

> *[S]ome say that this bill seeks to establish quotas . . . Not only does Title VII prohibit this,* but it establishes beyond any doubt a prohibition against any individual white as well as black being discriminated against in employment. It only seeks to insure that persons will be treated on their individual merits and in accordance with their qualifications. [72 Leg. Hist. at 294 (emphasis added)].[7]

And Rep. Erlenborn, the author of the rival bill, correctly identified the narrow scope of the dialogue by pointing out that *neither the Committee bill nor the Erlenborn substitute "is going to repeal the prohibition against quotas that is in Title VII of the Civil Rights Act"* [*Id.* at 261 (emphasis added)].

In the end—over the opposition of those normally associated with the "liberal" position on civil rights matters, including the members of the Black Caucus[8]—the

[7] Rep. Hawkins later repeated, during a colloquy, that Title VII already "prohibits the establishment of quotas." *Id.* at 289.

[8] See e.g., *id.* at 223-224 (Rep. John Conyers); *id.* at 232, 269-272 (Rep. Fauntroy); *id.* at 233-234 (Rep. Parren Mitchell); *id.* at 274-277 (Rep. Abzug); *id.* at 299-301 (Rep. Stokes).

House voted to adopt the Erlenborn substitute. *Id.* at 312-314. As that substitute did not provide for the transfer of OFCC administration to the EEOC, there was no occasion for the House to vote on the Dent amendment, which was never formally offered, nor on any other measure respecting the propriety of quotas under Executive Order 11246. What is important here is that all parties to the debate took as given, and did not propose to change, the fact that Title VII does not authorize court-ordered racial quotas.*

* The fact that the House debate manifests the uniform understanding that Title VII does not permit court-ordered quotas—not a surprising fact in view of the definitive resolution of that controversial issue just eight years earlier—precludes any notion that, because a few, isolated lower court cases purportedly authorizing court-ordered quotas had been decided by 1972, Congress should be deemed to have acted on the assumption that Title VII authorized such quotas.

Indeed our research has uncovered only two cases decided prior to the completion of the 1972 consideration of Title VII that even arguably approved quota remedies, and in both the approval was cryptic. In *Asbestos Workers v. Vogler*, 407 F.2d 1047 (5th Cir. 1969), the court upheld an injunction striking down nepotism and prior experience as requirements for union membership and "ordered the development of objective membership criteria," 407 F.2d at 1051, not racial quotas or preferences, to govern future admissions to union membership. Pending development of such objective criteria, the injunction prohibited new admissions of members (save identified discriminatees) and directed that during the interim period work referrals of existing members be made on a chronological basis, with alternating referrals of whites and blacks, *id.* In a cryptic passage near the end of its opinion, the Fifth Circuit explained that the temporary alternating referrals were required for "administrative reasons." *Id.* at 1055. In *United States v. Iron Workers Local 86*, 443 F.2d 544, 553-554 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971), the Court, relying on *Vogler*, sustained an injunction that contained compulsory numerical guidelines for minority admissions into apprentice programs, rejecting arguments that the injunction violated § 703(j). The court declared that the injunction it was affirming "did not establish a system of racial quotas or 'preferences' in violation of section 703(j)." 443 F.2d at 554. Thus while close reading of *Vogler* and *Ironworkers* reveals that orders establishing racial preferences were in fact approved, neither case purported to endorse court-ordered racial quotas in

While the Senate's consideration of proposed amendments was hardly more indicative of a desire to overturn the 1964 decision to prohibit quota remedies, we relegate discussion of the Senate's consideration to the margin. For given the House's clear opposition to quota remedies under Title VII, nothing the Senate might have done *alone* could have effectuated a turnaround of the 1964 decision. As this Court has recently confirmed, a congressional decision made by both houses and signed by the President may not later be overturned even by the positive action of one house, *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), and *a fortiori* cannot be found inferentially to have been overturned by rejection of proposed amendments within one house.[14]

Title VII cases. And there was as of 1972 case law and commentary supporting the opposite proposition, *viz.*, that quota remedies are not authorized under Title VIII. *Castro v. Beecher*, 334 F. Supp. 930, 945 (D. Mass. 1971); *Developments in the Law—Title VII*, 84 Harv. L. Rev. 1109, 1114-16 (1971).

To say the least, there was not on this issue in 1972 "established judicial precedent" "consistently and routinely" applied so there was in *Herman & MacLean v. Huddleston*, 459 U.S. 375, 385 (1983); see also, *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 379 (1982) ("the federal courts routinely and consistently had recognized an implied cause of action").

[14] In the Senate, there was one proposed amendment that related tangentially to the issue of court-ordered quotas. Senator Ervin, in the course of introducing numerous amendments to prolong a filibuster, introduced one prohibiting any "department, agency, or officer of the United States" from requiring employers to "practice discrimination in reverse by employing persons" in percentages or quotas on the basis of race, sex, religion or national origin (72 Leg. Hist. at 1017). This amendment, he explained, was addressed primarily to the OFCC's implementation of Executive Order 11246 to require government contractors to adopt quotas ("the Philadelphia Plan"), and secondarily to "[t]he EEOC", which "on less frequent occasions, has hailed employers before its bar to practice discrimination in reverse." (*Id.* at 1042-45.) The amendment was defeated by a vote of 44-22 (*Id.* at 1074-75).

Given the legislative dynamic in which the Ervin amendment was proposed—an ongoing filibuster that Senator Ervin was seeking to

3. It has been suggested that the last sentence of § 706(g) should be understood to be a limit on the relief available to *individuals* who are victims of unlawful discrimination but not to preclude a grant of preferential relief to a *class* of persons of the same race who are not victims. *See Stotts*, 104 S.Ct. at 2608-2609 (Blackmun J., joined by Brennan and Marshall JJ., dissenting). Such an interpretation would produce precisely the opposite result from that intended by Congress. The legislative history recounted above shows unmistakably that Congress decided that there were to be no quota remedies under Title VII. The unqualified assurances of the bill's sponsors would have been hollow, indeed, if they left room for quotas labelled "class-wide, race-conscious relief" (*Id.* at 2608). What quotas, after all, would not meet that description? It is self-evident that the fear to which these assurances were addressed was not that quotas would be awarded as relief to the victimized individuals (those individuals would be made whole by rightful place relief), but rather that quotas might emanate from precisely the notion advanced by the dissenters in *Stotts:* that Title VII would be seen as an instrument for according preferences to races rather than relief to individuals. It was to refute that concern

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probing through the introduction of multiple amendments—it is entirely possible that those seeking to end the filibuster (and who voted against all the amendments proposed by Senator Ervin) were basing their vote not on the substance of each amendment, but on the tactical judgment that the way to end the filibuster was to vote down each amendment proffered by those conducting the filibuster. Moreover, those not wishing to forbid goals and timetables under the Executive Order were required to vote against the Ervin Amendment, and the vote therefore cannot be understood as manifesting a desire to overturn Congress' 1964 decision disapproving court-imposed quotas under Title VII. The importance of such tactical considerations in the legislative process makes it always dangerous to impute a new meaning to a previously enacted statute from the choice of a later Congress not to amend that legislation. "Ordinarily, and quite appropriately, courts are slow to attribute significance to the failure of Congress to act on particular legislation." *Bob Jones University v. United States*, 461 U.S. 574, 600 (1983).

that the bill's sponsors pointed to the last sentence of § 706(g) as proof that the remedies under Title VII were to be victim-specific.

This Court's decisions to date have been faithful to the victim-specific remedial scheme intended by Congress. And those decisions leave no room for the issuance of judicial quotas under the label "class wide, race-conscious relief" advocated in the *Stotts* dissent.

a) As this Court has consistently recognized, Title VII provides protection to individuals, not to races as such. The language both of the provision defining unlawful conduct (§ 703) and of the remedial provision (§ 706(g)) focuses expressly on protecting the "*individual*" from unlawful discrimination in employment. In *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978) this Court stated:

> The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual or national class . . . Even a true generalization about a class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.

In *Connecticut v. Teal*, 457 U.S. 440, 453-454 (1982), the point was repeated:

> The principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole. Indeed, the entire statute and its legislative history are replete with references to protection for the individual employee. See, *e.g.*, §§ 703(a)(1), (b), (c) . . . .

And in *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983), this point was reiterated in each of the opinions. *Id.* at 1083-1086 (Opinion of Justice Marshall); *id.* at 1103 (Opinion of Justice Powell); id. at 1108 (Opinion of Justice O'Connor).

(b) Precisely because Title VII's focus is on the individual and not the racial class, this Court has recognized that in determining the appropriate remedy for a

Title VII violation—whether in an individual or a class action—relief must be limited to making whole individuals who have suffered discrimination by the defendant. Individuals whose claim to an entitlement to relief is that they are members of the same minority group as the victims, but who have not suffered from such discrimination, are already in the position they would have occupied in the absence of the defendant's discriminatory conduct and accordingly are not entitled to a court order that improves their position.

Thus, in *Franks v. Bowman Transportation Co.*, the Court drew the line as to the scope of permissible remedy between make-whole relief for "actual victims of racial discrimination" (424 U.S. at 772), which is permitted, indeed virtually required, and relief for nonvictims of such discrimination, which is not permitted. In *Franks*, the Court stated that the federal courts "are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victims of racial discrimination in hiring." 424 U.S. at 764. And the Court made clear that members of the plaintiff class in *Franks* who were found *not* to be actual victims of the defendant employer's discrimination—*viz.*, who were "not in fact discriminatorily refused employment as an OTR driver" (*id.* at 773 n.32)—would not be entitled to any equitable relief. *Id.* at 772-773, and n.32. Then, in *Teamsters*, the Court analyzed at length the question of how to determine whether a claimant for relief is an actual victim of the litigated violation and thus eligible for relief. 431 U.S. at 356-377.[18] That lengthy discussion in *Teamsters*

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[18] Under *Franks* and *Teamsters*, when a class violation of hiring discrimination is proven, the burden of proof shifts to the defendant to establish that individual members of the class who applied for the position or positions in question were not actually victims of the violation. This shift in the burden of proof, far from authorizing relief to nonvictims, simply determines how the court is to decide whether a given individual was a victim of discrimination and is thus entitled to relief. Members of the class against whom the unlawful practice was committed—*e.g.*, black applicants for jobs

would have been pointless if courts were empowered under Title VII to provide remedies to nonvictims.[17]

(c) This Court has also recognized that Title VII imports general principles of equity which may limit the remedial powers of courts even when the remedy is directed solely to victims of discrimination, and which certainly would preclude extending a preferential remedy to nonvictims at the expense of other innocent employees.

In the context of competitive hiring and promotion decisions, the Court has recognized that even a remedy designed only to make the victims of discrimination whole has a heavy cost: where a court order confers upon the individual who was a victim of the employer's wrong an improved competitive status with respect to a job, some employee who was not in any respect responsible for the employer's wrong is of necessity disadvantaged. A majority of the Court in *Franks* determined

from an employer who has been proved to have had an across-the-board practice of refusing to hire blacks—is presumed to be victims, unless the defendant proves otherwise. *Franks*, 424 U.S. at 772 n.32; *Teamsters*, 431 U.S. at 357-362.

[17] This Court's school desegregation decisions follow precisely the same remedial principle: "'to restore the victims of discriminatory conduct to the positions they would have occupied in the absence of such conduct.'" *Milliken v. Bradley*, 418 U.S. 717, 746 (1977) ("*Milliken II*"). In school cases, the violation generally consists of practices intentionally maintained by a school board for the purpose of segregating the races. All minority students subjected to such practices are victims of the violation. To make such victims whole may require both the "dismantling" of the discriminatory practices and the affirmative correction of education deficiencies which resulted from those practices. *Milliken II*, 433 U.S. at 282-283; *Dowell Bd. of Educ.*, 402 U.S. 1, 28, 31-32 (1971). In that context, for example, make-whole relief may require that a "dual system" be dismantled, which may in turn require such actions as race-conscious assignment policies for teachers and pupils alike. But, in that context, too, this Court has been careful to confine remedial decrees to the make-whole purpose, and has not permitted such decrees to be used to achieve goals, such as racial balancing, beyond that purpose. *Dowell*, 402 U.S. at 15-16, 31-32; *Pasadena City Bd. of Education v. Spangler*, 427 U.S. 424, 435-437 (1976); *Dayton Board of Education*, 433 U.S. 406, 419-420 (1977).

that it is consistent with equity for the innocent employee to be disadvantaged so that the victim can be made whole. 424 U.S. at 776-779; compare *id.* at 780-781 (Opinion of Chief Justice Burger) and *id.* at 787-793 (Opinion of Justice Powell.) But the majority recognized that there might be circumstances in which considerations of equity would dictate limiting the relief out of concern for the innocent employee. *Id.* at 779-780 & n. 41.

In *Teamsters*, after making it clear that nonvictims have no entitlement to a remedy of competitive seniority, 431 U.S. at 367-372, the Court stated that equitable balancing is required even in determining remedies for victims:

> [A]fter the victims have been identified and their rightful place determined, the District Court will . . . be faced with the delicate task of adjusting the remedial interests of discriminatees and the legitimate expectations of other employees innocent of any wrongdoing. [431 U.S. at 372 (emphasis added).]

In *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982), the Court disapproved as inequitable a remedy that would have encouraged employers to give competitive seniority advantage to persons who claim they are victims of discrimination but whose claims have not yet been adjudicated:

> . . . Title VII . . . permits us to consider the rights of "innocent third parties." *City of Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 723 (1978). See also *Teamsters v. United States*, 432 U.S. 324, 371-376 (1977). The lower court's rule places a particularly onerous burden on the innocent employees of an employer charged with discrimination. Under the court's rule, an employer may cap backpay liability only by forcing his incumbent employees to yield seniority to a person who has not proven, and may never prove, unlawful discrimination . . . .
>
> The sacrifice demanded by the lower court's rule, moreover, leaves the displaced workers without any remedy against claimants who fail to establish their

> claims. If, for example, layoffs occur while the Title VII suit is pending, an employer may have to furlough an innocent worker indefinitely while retaining a claimant who was given retroactive seniority. If the claimant subsequently fails to prove unlawful discrimination, the worker unfairly relegated to the unemployment lines has no redress for the wrong done him. We do not believe that the " 'large objectives' " of Title VII, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975) (citation omitted), require innocent employees to carry such a heavy burden. [450 U.S. at 239-240.]

Where, as in the instant cases, a court is asked to direct that a nonvictim of discrimination be given a job instead of an innocent employee of a different race, solely because the nonvictim is of the same race as other persons who were actually discriminated against, there is not the competition of legitimate interests that calls into play equitable discretion. To give the nonvictim the job is not to "restore [him to his] rightful place" (*Franks*, 424 U.S. at 375)—he was not wrongfully deprived of that place in the first instance. On the other hand, the "innocent worker" deprived of a job would have had a "wrong done him." *Ford Motor Co.*, 458 U.S. at 240.

II. RACIAL QUOTA REMEDIES ARE NOT AUTHORIZED FOR VIOLATIONS OF 42 U.S.C. § 1981

The question whether courts may impose racial quotas benefiting nonvictims at the expense of innocent persons upon finding a violation of 42 U.S.C. § 1981 was not addressed in *Stotts*, *see* 104 S.Ct. at 2590, n. 16, but arguably is presented here in No. 84-1999 (*see* p. 1, n. 1 *supra*). As in the case of Title VII, the question is strictly one of statutory interpretation.

Section 1981 provides in pertinent part:

> All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 1981 forbids racial discrimination in private as well as public employment, *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), and protects whites equally with blacks against such discrimination, *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 285-96 (1976).

1. Analysis of the permissible scope of judicial remedies properly begins with the nature of the substantive right that Congress sought to vindicate. It is difficult to conceive of a statutory command to which quota "remedies" according preference to nonvictims on the basis of race would be more antithetical than the command of § 1981. If one or more persons are denied "the same right . . . to make and enforce contracts," it is plain that the court is empowered to make the victims whole for that deprivation and assure that the wrong is not repeated. But for a court to impose a quota that would run to the benefit of other persons who were not victims of a violation of § 1981, and that would extend them a preference based solely on their race over others who have done no wrong, would be to visit the very injustice against which § 1981 was directed. The innocent white would be deprived of "the same right" to make contracts as the nonvictim black; and the judicially-ordered racial preference would violate the statute's command that "all persons" are to "be subject to like punishment, pains, penalties . . . and exactions of every kind, *and to no other*" (emphasis added).

The remedial power of a court sitting in equity is not unlimited. *Swann v. Board of Education*, 402 U.S. 1, 31 (1971); *Hills v. Gautreaux*, 425 U.S. 284, 294 (1976); *Pasadena City Bd. of Education v. Spangler*, 427 U.S. 424, 434 (1976). *Cf. Hecht v. Bowles*, 321 U.S. 321, 329-330 (1944). Foremost among the applicable limitations is that "the scope of the remedy is determined by the nature and extent of the . . . violation." *Milliken v. Bradley*, 418 U.S. 717, 744 (1974) (*Milliken I*); *see also, e.g., Swann*, 402 U.S. at 16; *Milliken v. Bradley*, 433 U.S. 267, 280 (1977) (*Milliken II*): "Rights, constitutional or otherwise, do not exist in a vacuum. Their

purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect," *Carey v. Piphus*, 435 U.S. 247, 254 (1978). The remedies fashioned for deprivation of those rights "should be tailored to the interests protected by the particular rights in question" (*id.* at 259). The task of the equity court "once a . . . violation is found, . . . is . . . to tailor 'the scope of the remedy' to fit 'the nature and extent of the . . . violation.'" *Hills*, 425 U.S. at 294; see also *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 420 (1977). And this Court has defined with precision the way in which the remedy must relate to the violation: "the decree must indeed be remedial in nature, that is, it must be designed as nearly as possible 'to restore the *victims* of discriminatory conduct to the position they would have occupied in the absence of such conduct.'" *Milliken II*, 433 U.S. at 280 (emphasis added); see also *Milliken I*, 418 U.S. at 76. See p. 18 n. 12, *supra*.

Thus, in assessing whether a remedial decree has exceeded proper limits, it is critical to know what is the violation being remedied, who are the victims, and how has the violation affected the victims. Section 1981 is designed to protect individuals from discrimination on the basis of race; it is not intended to mandate racial balance or the achievement of particular proportions of the races in a given workforce. In the words of one of its sponsors, § 1981 "is not for any race or color . . . but . . . will, if it become[s] a law, protect every citizen . . ." (quoted in *McDonald v. Santa Fe*, *supra*, 427 U.S. at 295). And, this Court has held that § 1981 does not reach "practices that merely result in a disproportionate impact on a particular class . . ." *General Building Contractors Association v. Pennsylvania*, 458 U.S. 375, 386 (1982).

It follows from what we have shown thus far that under § 1981 the individuals who have suffered discrimination by the defendant—the victims—are the ones entitled to be made whole. Individuals whose claim to an

entitlement to relief is that they are members of the same racial group as the victims, but who have not suffered from such discrimination, are already in "the position they would have occupied in the absence of [the defendant's discriminatory] conduct," *Milliken II*, 433 U.S. at 280, and are not entitled to a court order that improves their position—an order that would yield them "a windfall, rather than compensation," *Carey v. Piphus*, 435 U.S. at 260.

That would be the case even if an award to nonvictims would not harm innocent third parties. But in employment discrimination cases such as these, where relief that benefits nonvictim blacks necessarily deprives innocent whites of employment opportunities, it is all the more clear that "the 'historic power of equity'" (*Albemarle Paper Co., v. Moody*, 422 U.S. 405, 416 (1975)) does not countenance such relief. That is the teaching of this Court's analysis of the competing equities at issue in *Fresno*, *Teamsters*, and *Ford* (see pp. 17-20 *supra*); and that teaching is equally applicable under § 1981. Thus, to hold that quota remedies are available under § 1981 would require the conclusion that the post-Civil War Congress intended to authorize the courts to prescribe a form of relief which, under long-established principles of equity, is an inappropriate remedy for a violation of the rights Congress created in that statute. There is no basis for such a conclusion. Not only were such remedies unheard of at the time § 1981 was enacted (indeed, for a century thereafter), but they would be antithetical to the very values enshrined in § 1981.

2. Analysis of the courts' remedial authority in § 1981 actions is not complete without consideration of 42 U.S.C. § 1988. Section 1988 was enacted at the same time as § 1981 and applies to suits brought pursuant to § 1981. Section 1988 does not itself specify remedies for § 1981 actions. But § 1988 does state that in § 1981 suits courts will enforce their jurisdictions "in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect"; only if "the laws of

1964 only in lower court orders that have misapplied the congressional will in Title VII cases.

Moreover, it is surely pertinent in applying § 1988 that when Congress first addressed the propriety of quota remedies—during consideration of Title VII—it set its face squarely against them. While the precise product of the 1964 debates was a determination that quota remedies would not be authorized under Title VII (see part I, *supra*), that result does not reflect simply a choice not to add a particular remedy to the arsenal of powers afforded the judiciary for enforcement of that particular statute (as is the case, for example, in the judgment to provide only equitable relief (including backpay), and not compensatory or punitive damages, under Title VII). Rather, the decision not to authorize quota remedies reflects a congressional determination that governmentally-imposed quota remedies are antithetical to the very values upon which Title VII is premised. In the words of the Clark-Case materials, quota remedies were not being authorized in Title VII because "[q]uotas are themselves discriminatory" (110 Cong. Rec. 7218).[14] See also, Senator Humphrey's repeated declarations that he would "vote against" Title VII if it authorized quota remedies, (*id.* at 5092), that such remedies were a "bugaboo" and the "very opposite" of what Title VII was attempting to achieve (*id.* at 6548; see also, *id.* at 11847), and that "I do not believe in a quota system" (*id.* at 7909). And see, to the same effect, 110 Cong. Rec. 8500, 9881 (Sen. Allott); *id.* at 9113 (Sen Keating).

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raised the spectre of quota remedies not because there was a backdrop of judicial quota remedies in other contexts—there was not—but because they feared that the then-incumbent administration would champion them, as "evidenced by numerous Executive orders, other administrative actions and statements of officials in the executive branch of the Federal Government." H.R. Rep. No. 914, 88th Cong. 1st Sess. 64, 66 (1963) (Minority Report).

[14] This theme appeared throughout the Clark-Case materials. See, e.g., 110 Cong. Rec. 7207 (Dept. of Justice letter); *id.* at 7213 (Clark-Case interpretative memorandum). See *supra*, p. 6 n. 4.

the United States . . . are not adapted to the object [of § 1981], or are deficient in the provisions necessary to furnish suitable remedies," may the courts apply "the common law, as modified and changed by the constitution and statutes of the States wherein the court having jurisdiction of such . . . cause is held . . . ." 42 U.S.C. § 1988.

In *Smith v. Wade*, 461 U.S. 30 (1983), a closely-divided Court stated—presumably on the basis of § 1988—that the remedies available in a § 1983 action are not necessarily fixed at those that could have been within the contemplation of the Congress that enacted § 1983, explaining that "if the *prevailing view* on *some point* of . . . law has changed substantially in the intervening century . . . we might be highly reluctant to assume that Congress intended to perpetuate a *now-obsolete* doctrine." *Id.* 34, n.2 (emphasis added); but see, *id.* at 65-66 (Rehnquist, J., dissenting); *id.* at 92-93 (O'Connor, J., dissenting). Assuming that the same approach would prevail in § 1981 actions, that approach would only strengthen the view that quota remedies are impermissible in such actions. For that approach would lead directly to the determination of the modern Congress, in enacting Title VII, to forbid racial quota remedies.

In the intervening century between enactment of § 1981 and enactment of Title VII there was no evolution making quota remedies the "prevailing view" or their refusal an "obsolete doctrine." Indeed, at the time Congress was debating Title VII in 1964, quota remedies were non-existent, a point cited by the sponsors of Title VII as proof that such remedies would not result under Title VII.[13] Racial quotas have emerged subsequent to

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[13] See, e.g., 110 Cong. Rec. 6991 (Sen. Humphrey, explaining that quota remedies have not eventuated under State FEPC laws); *id.* at 7000 (colloquy between Senators Humphrey and Smathers in which they agree that no State has ordered quotas under its FEPC law); *id.* at 8921 (Sen. Williams of New Jersey explaining that quota remedies have not been issued in cases finding racial discrimination in the selection of juries). The opponents of Title VII had

Given that §§ 1981 and 1988 had not been construed to authorize quota remedies prior to 1964, and that Congress in that year, upon first addressing the propriety of racial quotas, adjudged them antithetical to the principle of equal employment opportunity, it would be inappropriate to import them through subsequent judicial interpretation of §§ 1981 and 1988. Courts should not be free effectively to circumvent the judgment of the Congress that enacted Title VII by imputing to the Congress that enacted §§ 1981 and 1988, without a basis in the legislative materials, an "intent" to allow quota remedies.

3. Even without the express command of § 1988 that resort be had to other federal laws, the principle that general legislation should not be interpreted by the courts to achieve results inconsistent with the clear intent of Congress manifested in later, more specific legislation would point to the same result. In *Labor Board v. Drivers Local Union*, 362 U.S. 274 (1960), for example, the NLRB had construed Section 8(b)(1)(A) of the NLRA, 29 U.S.C. § 158(b)(1)(A)—which in general terms makes it an unfair labor practice for a union "to restrain or coerce" employees in the exercise of their Section 7 rights—to outlaw all recognitional picketing. This Court reversed, relying in part upon the fact that when Congress later focused specifically on recognitional picketing it outlawed only certain forms of such picketing:

> To be sure, what Congress did in 1959 does not establish what it meant in 1947. However, as another major step in an evolving pattern of regulation of union conduct, the 1959 Act is a relevant consideration. Courts may properly take into account the later Act when asked to extend the reach of the earlier Act's vague language to the limits which, read literally, the words might permit. We avoid the incongruous result implicit in the Board's construction by reading § 8(b)(1)(A), which is only one of many interwoven sections in a complex Act, mindful of the manifest purpose of the Congress to fashion a coherent national labor policy. [362 U.S. at 291-92].

See also, *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 193-95 (1967); *Hunter v. Erickson*, 393 U.S. 385, 388 (1969). The language of §§ 1981 and 1988 is not so "vague" as even to be "read literally" to authorize quota remedies. But even if it were, the principle just quoted would dictate against such remedies, particularly where, as here, what is at issue is the proper exercise of the courts' equity powers. For it can hardly be equitable for a court to award under § 1981 the very relief that Congress denounced as unjust when it enacted Title VII.[11]

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[11] We recognize that this Court has "generally conclude[d] . . . that the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent." *Johnson v. Railway Express Agency*, 421 U.S. 454, 461 (1975). But while it follows that remedies are not foreclosed for § 1981 violations simply because they are not authorized for Title VII violations (*e.g.* compensatory and punitive damages, *id.* at 460), it does not follow that under § 1981 courts may award remedies that Congress excluded in enacting Title VII were a positive evil. A too-rigid adherence to the independence of § 1981 from Title VII could lead, for example, to the invalidation of seniority systems that Congress acted affirmatively to "protect" in Title VII (*see, e.g., Johnson v. Ryder Truck Lines, Inc.*, 575 F.2d 471, 474-75 (4th Cir. 1978), *cert. denied*, 440 U.S. 959 (1979); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1191 n.37 (5th Cir. 1977), *cert. denied*, 439 U.S. 1115 (1979)), or, as here, to the erosion of other values that a contemporary Congress has adopted as the policy of our nation.

A useful analogy is furnished by this Court's treatment of 42 U.S.C. § 1982, which was enacted as part of the same statute as § 1981. In *Jones v. Mayer Co.*, 392 U.S. 409, 416 (1968), this Court declared that "[t]he Civil Rights Act of 1968 does not mention 42 U.S.C. § 1982, and we cannot assume that Congress intended to effect any changes, either substantive or procedural, in the prior statute." One year later, the Court ruled, in *Hunter v. Erickson*, 393 U.S. at 388:

> The 1968 Civil Rights Act specifically preserves and defers to local fair housing laws, and the 1866 Civil Rights Act considered in *Jones* should be read together with the later statute on the same subject, *U.S. v. Stewart*, 311 U.S. 60, 64-65 (1940); *Tidal v. Swanson*, 1 Cranch. 1, 34-35 (1801), so as not to pre-empt the local legislation which the far more detailed Act of 1968 so explicitly preserves.

III. RACIAL QUOTA REMEDIES ARE NOT AUTHORIZED IN ACTIONS BROUGHT UNDER 42 U.S.C. § 1983

In the case of public employers, racial discrimination also violates the Fourteenth Amendment and is actionable under 42 U.S.C. § 1983. This Court did not address in *Stotts* whether quota remedies are available in § 1983 actions, see 104 S.Ct. at 2590, n.16.

Just as in the case of § 1981, suits brought under § 1983 are subject to the provisions of § 1988. And, like Title VII and § 1981, the rights enforced in a § 1983 action are the rights of *individuals* to be free of racial discrimination. Section 1983 by its terms protects "any citizen . . . or other person within the jurisdiction"; transgressors incur liability "to the party injured." See, e.g., *Wilson v. Garcia*, —— U.S. ——, 105 S.Ct. 1938, 1948 (1985). And the Fourteenth Amendment itself—the source of the right to be free of racial discrimination enforceable under § 1983—is, like Title VII, designed to protect individuals. As this Court stated in *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948):

> [T]he rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.

See also *Castaneda v. Partida*, 430 U.S. 482, 499-500 (1977); *University of California Regents v. Bakke*, 438 U.S. 265, 299 (1978) (Opinion of Justice Powell.)

And, this Court repeatedly has held that the Fourteenth Amendment, whether sued on directly or through § 1983, does not prohibit official conduct simply because that conduct has a greater adverse effect on racial or ethnic minority *groups* than on majority *groups*. In *Washington v. Davis*, 426 U.S. 229, 239 (1976), the

Court held that "a racially neutral qualification for employment is [not] discriminatory . . . simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups." *Id.* at 245. "That other Negroes also failed to score well would, alone, not demonstrate that [plaintiffs] *individually* were being denied equal protection of the laws . . ." *Id.* at 246 (emphasis added). See also, *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264-265 (1977); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 272 (1979).

With these similarities established, the analysis we have heretofore provided with respect to § 1981 is equally applicable to suits brought under § 1983. The "historic power of equity" no more warrants judicial dispensation of racial preferences to nonvictims over other innocent persons in § 1983 actions than in § 1981 actions.[29]

---

[29] Of course, given that § 1983 furnishes a cause of action to enforce *constitutional rights* it is arguable that the courts in § 1983 actions have the power to issue remedies beyond those authorized by Congress. That power of course would remain circumscribed by the basic principle of equity that "the scope of the remedy is determined by the nature and extent of the violation." See cases cited *supra* at pp. 21-22. And even if the courts were somehow released from that limitation, it would not follow that Congress' judgments about what remedies are appropriate, and what inappropriate, are to be disregarded in fashioning relief for constitutional violations. Thus, even assuming *arguendo* that the federal courts have *power* in constitutional cases to enter quota remedies compelling the subordination of the interests of innocent employees of one race to advantage nonvictims of another race, the congressional judgment that such remedies are inappropriate is entitled to weight in the courts' determination whether that power should be exercised. In *Bush v. Lucas*, 462 U.S. 367 (1983), for example, where the petitioner sought "a new nonstatutory damages remedy for federal employees whose First Amendment rights are violated by their superiors" (*id.* at 368), this Court declined to adopt this remedy, explaining:

> Because such claims arise out of an employment relationship that is governed by comprehensive procedural and substantive remedies . . . we conclude that it would be inappropriate for us

CONCLUSION

For the reasons set forth above, the decisions of the courts of appeals in these cases should be reversed.

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to supplement that regular scheme with a new judicial remedy. [*Ibid.*]

This Court did not question its "power [in suits arising directly under the Constitution] to grant relief that is not expressly authorized by statute" (*id.* at 323), but concluded that the circumstances warranted no departure from its predisposition that "such power is to be exercised in the light of relevant policy determinations made by the Congress" (*ibid.*). The Court ultimately answered in the negative the question "whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by a new judicial remedy for the constitutional violation at issue." *Id.* at 388.

APPENDIX

Additional Statements of Proponents of the Bill That Became the Civil Rights Act of 1964 Respecting the Availability of Quota Remedies under Title VII

The Republican sponsors of Title VII in the House, in their "Additional Views" to the House Judiciary Report, declared:

> It must also be stressed that the [Equal Employment Opportunity] Commission must confine its activities to correcting abuse, not promoting equality with mathematical certainty. In this regard, nothing in the title permits a person to demand employment. Of greater importance, the Commission will only jeopardize its continued existence if it seeks to impose forced racial balance upon employers or labor unions.[1]

Senator Clark, one of the bipartisan "captains" for Title VII, declared in his principal speech describing Title VII: "The suggestion that racial balance or quota systems would be imposed by this proposed legislation is entirely inaccurate."[2] At the conclusion of his speech he introduced a Justice Department letter that stated:

> There is no provision, either in title VII or in any other part of the bill, that requires or authorizes any Federal agency or Federal court to require preferential treatment for any individual or any group for the purpose of achieving racial balance . . .[3]

Senator Humphrey, responding to a political advertisement opposing enactment of Title VII, stated on the floor of the Senate:

---

[1] H. Rep. No. 914, *supra*, at 130.

[2] 110 Cong. Rec. 7207.

[3] *Id.* at 7207.

> [N]othing in the bill would permit any official or court to require any employer or labor union to give preferential treatment to any minority group.[4]

And, responding to a charge by Senator Smathers that Title VII would lead to employment quotas, Senator Humphrey declared:

> The quota system which has been discussed is nonsense. Everybody knows that it is not in the bill, and that where there are State FEPC laws, it is not the pattern.
>
> . . . The only thing that the court would do would be to ask the defendant to cease and desist, to tell him to stop this practice, if it can be proved that the practice has been unlawful.[5]

Senator Humphrey, in an extended colloquy with Senator Robertson, made the following remarks:

> I feel sure that the Senator from Virginia is not going to suggest or intimate that under this title of the bill there would be such a thing as a quota or a required percentage.
>
> • • •
>
> [C]an the Senator from Virginia point out in title VII any section or subsection or provision that would indicate that in connection with the elimination of the segregation in employment based on color, race, religion or national origin an employer would be required to hire any member of a certain ethnic group?
>
> • • •
>
> I would like to make an offer to [the Senator]. If the Senator can find in title VII . . . any language which provides that an employer will have to hire on the basis of percentage or quota related to color, race, religion, or national origin, I will start eating

[4] *Id.* at 5423.

[5] *Id.* at 6091.

> the pages one after another, because it is not in there.[6]

Senator Allott, one of the Republican sponsors of the bill, in another colloquy with Senator Smathers, expressed his disapproval of governmentally-imposed quotas:

> I completely agree with the Senator that if an employer were required to employ a person on the basis of a quota, there would be no justification for that procedure under the American system . . .
>
> • • •
>
> The only point I wish to make is that if anyone sees in the bill quotas or percentages, he must read that language into it. It is not in the bill.[7]

Senator Williams of New Jersey, declaring that "there is nothing whatever in the bill that provides for racial balance or quotas in employment," cited as proof of this proposition that courts did not enter quotas remedies upon finding racial discrimination in the selection of juries.[8]

Senator Keating, in a colloquy with Senator Sparkman, secured the latter's agreement that "the bill does not provide in any way for quotas of any kind."[9] Senator Keating later declared, in response to a public advertisement that the bill would require quotas:

> The coordinating committee has charged . . . that Title VII would . . . permit the Government to impose quotas and preferences upon employers and labor organizations in favor of minority groups . . .
>
> Title VII does not grant this authority to the Federal Government . . .

[6] *Id.* at 7418-20.

[7] *Id.* at 8500-01.

[8] *Id.* at 9021.

[9] *Id.* at 5618.

An employer or labor organization must first be found to have practiced discrimination before a court can issue an order to prohibit further acts of discrimination in the first instance. Adequate administrative and judicial procedures have been provided in the title to assure that an order of court is only founded upon clear and conclusive evidence of discrimination. For the Commission to request or a court to order preferential treatment to a particular minority group would clearly be inconsistent with the guarantees of the Constitution.[10]

---

[10] *Id.* at 9113.

AMICUS CURIAE

BRIEF

Nos. 84-1656, 84-1999

Supreme Court, U.S.
FILED
JAN 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Petitioners,

—against—

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, THE CITY OF NEW YORK, and NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, C.L.C.,

Petitioner,

vs.

CITY OF CLEVELAND, et al.,

and

VANGUARDS OF CLEVELAND,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE NATIONAL CONFERENCE OF BLACK MAYORS, INC. IN SUPPORT OF RESPONDENTS

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Interest of *Amicus*

The National Conference of Black Mayors, Inc. ("NCBM") respectfully submits this brief in support of respondents. Its members represent 22 million people of all races in 283 communities, including Los Angeles, Chicago, Philadelphia, Washington, D.C., New Orleans and Atlanta, as well as Highland Beach, Maryland, Penermon, Mississippi and Pembroke, Illinois.

The Justice Department is currently challenging nationwide the long-accepted legal principles justifying affirmative action. Fifty-one jurisdictions (including Los Angeles, Chicago and Philadelphia) have been asked by the Department to revise existing consent decrees for the purpose of eliminating goals and timetables from affirmative action plans. Department of Justice Press Release, April 2, 1985. NCBM members have worked hard for agreement on these plans and, in doing so, for racial peace. These efforts will be seriously jeopardized if this Court overturns the decisions of the courts below.

NCBM has formed a coalition of national organizations, the National Committee to Defend and Extend Affirmative Action, which provides continuing support for programs of equal access to jobs.

NCBM's members should be accorded substantial latitude in staffing municipal work forces. All of the municipalities in which NCBM's members hold office have substantial black populations. It is critical that these municipalities have the right to choose employees from a qualified and diverse pool of applicants which reflects the municipalities' racial composition. This is true not only because of the imperative of public peace, but also because of the need for public cooperation, founded on the true consent of the governed. NCBM therefore urges this Court to permit

public employers to implement reasonable, appropriately-tailored, voluntary race-conscious plans in response to acute racial disparities in their work forces that are a direct consequence of the country's lamentable history of racial discrimination in public employment.

Consent of the Parties

All parties in both actions have consented, in letters on file with the Clerk, to the filing of this brief.

Summary of Argument

The affirmative action plans at issue are valid under the thirteenth, fourteenth and tenth amendments. The fourteenth amendment does not command "color blindness." The plans need only be substantially related to achieving important state interests, which include the need (1) to eliminate the disabling effects of racial discrimination in public and publicly-funded employment; (2) to enlarge the pool of applicants for public employment, thus increasing the quality of workers in public service and improving public service itself; (3) to set a positive example for private employers; and (4) to preserve racial harmony and maintain public order.

The fourth interest is particularly compelling for the cities represented by NCBM's members. Lack of equal employment opportunities historically has been a cause of unrest in our nation's major urban areas. Reasonable, precisely-tailored affirmative action plans, such as those at issue here, are a fair means of diffusing racial tensions.

The plans are also authorized under the thirteenth amendment. That amendment, which was a response to the racial strife of the Civil War era, embodies a sweeping prohibition against slavery's heir, racial discrimination. In 42

U.S.C. § 1981, Congress has clothed the federal courts with power to extirpate such discrimination.

Municipal authority to promulgate affirmative action plans is bottomed on the tenth amendment. If our system of federalism is to remain vital, municipalities must be permitted to experiment with affirmative action as a means of maintaining public order and securing racial concord.

The affirmative action plans may also be constitutionally required. The fourteenth amendment demands more than simply ending past official racial discrimination. Positive steps, such as affirmative action, are essential to achieving equal opportunity in public and publicly-funded employment.

Title VII was extended to cover public employees under the fourteenth amendment. Affirmative action was explicitly endorsed by Congress. Municipal employers should be accorded the same approval of affirmative action as this Court has given for private employers, especially as the federal executive role in this area diminishes.

Any expansive interpretation of *Firefighters Local Union No. 1784* v. *Stotts* that would invalidate the plans at issue is bereft of textual support and is at war with Title VII.

ARGUMENT

POINT I

The Affirmative Action Plans Are Valid Under the Fourteenth, Thirteenth and Tenth Amendments.

The cities of New York and Cleveland are empowered to consent to the affirmative action plans at issue under the fourteenth, thirteenth and tenth amendments. As narrowly-tailored, reasonable and temporary methods of

eliminating the effects of past discrimination in public and publicly-funded employment, the plans are reasonable means of serving important state interests under the fourteenth amendment. As a method of eradicating remaining badges and incidents of slavery, the plans are authorized by the thirteenth amendment. Finally, as creative means of securing public order, promoting racial harmony and improving the quality of public service, the plans are justified by the tenth amendment.*

A. The Equal Protection Clause of the Fourteenth Amendment Does Not Prohibit the Affirmative Action Plans.

The equal protection clause of the fourteenth amendment does not prohibit the affirmative action plans at issue. Both plans are circumspectly drawn, reasonable and temporary. They were prompted, in part, by the compelling needs of

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* The Vanguards' complaint alleged jurisdiction, *inter alia*, under the thirteenth and fourteenth amendments, *Vanguards of Cleveland* v. *City of Cleveland*, 753 F.2d 479, 481 (6th Cir.), *cert. granted*, 106 S. Ct. 59 (1985). Local 28's complaint alleged jurisdiction, *inter alia*, under the fourteenth amendment. *EEOC* v. *Local 638*, 753 F.2d 1172, 1185 (2d Cir.), *cert. granted*, 106 S. Ct. 58 (1985) *(Sheet Metal Workers)*. The tenth amendment was not pleaded by any party. This Court has made clear, however, that it is not confined by the pleadings when taking, for example, the fateful step of striking down a statute as unconstitutional. *See, e.g., Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *compare* Rule 34.1(a) of this Court (". . . the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide."). If, as we contend, the authority of the tenth amendment vindicates the plans at bar, the grave interests at stake should lead this Court to confirm that authority.

Moreover, the Equal Employment Opportunity Commission ("EEOC") claims that *Sheet Metal Workers* ". . . is purely a Title VII case," Brief for the EEOC at 25, footnote, *Local 28* v. *EEOC*, but it frames the fifth question presented in its *Sheet Metal Workers* brief as: "Whether such remedies are unconstitutional." Thus, constitutionality, *vel non*, is before the Court.

Cleveland and New York to eliminate the disabling effects of hoary and flagrant histories of racial discrimination in employment.

In *Vanguards*, the District Court found "a historical pattern of racial discrimination in promotions in the City of Cleveland Fire Department." 753 F.2d at 483. In *Sheet Metal Workers*, the Second Circuit, in decision after decision, cataloged "long continued and egregious race discrimination." 753 F.2d at 1186; *EEOC* v. *Local 638*, 565 F.2d 31, 36 n.8 (2d Cir. 1977); *EEOC* v. *Local 638*, 532 F.2d 821, 825 (2d Cir. 1976). The City of New York was not the employer guilty of discrimination in *Sheet Metal Workers*. It was recognized, however, that "Local 28 . . . exercises complete control over entry into the sheet metal trades in New York City." 532 F.2d at 824. The City was granted the opportunity to intervene in *Sheet Metal Workers* based, in part, on its status as a regular contracting party with the sheet metal industry. *United States* v. *Local 638*, 347 F. Supp. 164, 166 (S.D.N.Y. 1972). Thus, New York City is not unlike Cleveland, to the extent both municipalities are attempting to eliminate the effects of past racial discrimination in public, or publicly-funded, employment.

The affirmative action plans are consistent with the purposes of the fourteenth amendment and are substantially related to achieving important state interests, including the need (i) to eliminate the disabling effects of racial discrimination in public and publicly-funded employment; (ii) to enlarge the pool of applicants for public employment; (iii) to set a positive example for private employers; and (iv) to preserve racial harmony and maintain public order.

1. *The Legislative History of the Fourteenth Amendment and Statutes Promulgated Concurrent Therewith Support Affirmative Action.*

The fourteenth amendment was not intended to be "color blind." This Court has recognized that "color blindness" can be exploited as a pretext to justify continued discrimination. *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 45-46 (1971). As a result, affirmative action will be needed until society satisfies "the century-old promise [of the fourteenth amendment] of equality of economic opportunity." *Fullilove* v. *Klutznick*, 448 U.S. 448, 463 (1980) (Burger, C.J.); *see Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 405 (1978) (Blackmun, J.).

The historical context within which the fourteenth amendment was adopted belies any characterization of the amendment as color blind. The amendment was passed during Reconstruction, as part of the national effort to eliminate racial discrimination. Professor Ely has explained:

> [T]he express preoccupation of the framers of the [fourteenth] amendment was with discrimination against Blacks, that is, with making sure that Whites would not, despite the thirteenth amendment, continue to confine Blacks to an inferior position.

Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723, 728 (1974).

The legislative history of several Reconstruction statutes, passed at or around the time Congress proposed the fourteenth amendment, vitiates the notion that the fourteenth amendment prohibits all race-conscious legislation. *See generally* Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753 (1985). The foremost example is the Freedmen's Bureau Act of 1866 ("1866 Act"), Act of July 16, 1866, Ch. 200, 14 Stat. 173 174-76, passed by Congress less than one month after it approved the fourteenth amendment. *Compare* Cong. Globe, 39th Cong., 1st Sess. 3149 (1866) (House approved Senate changes to fourteenth amendment and voted it into law on June 13, 1866) *with id.* at 3524, 3562 (Conference Report on Freedmen's Bureau Act accepted on July 2 and 3, 1866).

The 1866 Act continued the operations of the Freedmen's Bureau, established one year earlier, to provide special assistance and protection to blacks. Act of March 3, 1865, Ch. 90, 13 Stat. 507, 508. The 1866 Act gave blacks preference, for example, in the acquisition of certain real estate, *id.* at 372 (statement of Sen. Hendricks), and the availability of education, *id.* app. at 71 (statement of Rep. Rousseau). As a result, the legislation was opposed on grounds still echoed today by opponents of the race-conscious plans at issue. *See, e.g.*, Brief for the EEOC at 32-34, *Local 28* v. *EEOC* (advancing the contention of invalidity as to the order establishing tutorials, counseling, and low-interest loans for nonwhites in the apprenticeship program, funded by contempt fines imposed on whites). Critics argued that the 1866 Civil Rights bill unfairly penalized whites for the benefit of blacks, Cong. Globe, 39th Cong., 1st Sess. 402 (statement of Sen. Davis); *id.* app. at 78 (statement of Rep. Chanler), and that the bill would harm blacks by fostering dependence on government, *id.* at 401 (statement of Sen. McDougall), or provoking white resentment, *id.* app. at 69-70 (statement of Rep. Rousseau).

Supporters of the bill, however, recognized that the government had "liberated four million slaves in the South . . . [and to] stop right here and do nothing more . . . would be a cruel mockery." *Id.* at 588 (statement of Rep. Donnelly). They admitted that the 1866 Act was not

color blind. Its racial distinctions were necessary to ameliorate the condition of those who for so long had been victims of the most brutal form of discrimination, *see id.* at 631-32 (statement of Rep. Moulton), and who lacked the political power otherwise to protect themselves, *id.* app. at 75 (statement of Rep. Phelps) (quoted in *Bakke*, 438 U.S. at 397 (Marshall, J., dissenting)). Based on these arguments, the 1866 Act was passed overwhelmingly over the veto of President Andrew Johnson. It is unlikely that the thirty-ninth Congress intended the fourteenth amendment, enacted in June 1866, to invalidate race-conscious remedial action when the same Congress passed the Freedmen's Bureau Act, which is clearly race-conscious, less than one month later.

To accept the fourteenth amendment as "color blind" is tantamount to ignoring the framers' contrary intent* and to condoning the perpetuation of historical discrimination. As Justice Blackmun warned in *Bakke*: "We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy." 438 U.S. at 407. That would be, however, the inevitable result of an interpretation of the equal protection clause which would bar the affirmative action plans at issue.

2. *The Affirmative Action Plans Serve Important State Interests.*

Recognizng that "[i]n order to get beyond racism, we must first take account of race," *Bakke*, 438 U.S. at 407 (Blackmun, J.), a majority of the Justices of this Court, in *Bakke* and in *Fullilove*, have agreed that, in appro-

* The Attorney General has emphasized the importance of ascertaining the original intent of the framers when interpreting constitutional provisions. *E.g.*, Blumenthal, *The Right's Quest for Law From a Mythical Past*, The Washington Post, November 3, 1985, § C, at 1. No less a standard should be relevant to the fourteenth amendment.

priate circumstances, race-conscious remedies are constitutionally permissible. As to the test under which racial classifications embodied in affirmative action plans should be reviewed, this Court has not settled on a standard. Justices Brennan, White, Marshall and Blackmun would demand that "racial classifications designed to further remedial purposes . . . serve important governmental objectives and must be substantially related to achievement of those objectives." *Bakke*, 438 U.S. at 359. Chief Justice Burger and Justice Powell would require much the same showing, yet with greater inquiry into whether the plan is narrowly tailored. *Fullilove*, 448 U.S. at 480-82 (Burger, C.J.); *id.* at 510-15 (Powell, J.); *Bakke*, 438 U.S. at 305 (Powell, J.). The plans satisfy both tests.

a. Remedying the Effects of Past Discrimination

The plans serve several important governmental interests. The first is that of remedying identified discrimination. *See Fullilove*, 448 U.S. at 472-78 (Burger, C.J., Powell, White, JJ.); *id.* at 515 (Powell, J.); *id.* at 519-21 (Brennan, Marshall, Blackmun, JJ.); *Bakke*, 438 U.S. at 307 (Powell, J.); *id.* at 362 (Brennan, White, Marshall, Blackmun, JJ.). To establish this interest, the governmental body implementing the plan must show that qualified persons have made findings of past discrimination. *Valentine* v. *Smith*, 654 F.2d 503, 508 (8th Cir.), *cert. denied*, 454 U.S. 1124 (1981). While NCBM would contend that the cities of Cleveland and New York are competent to make this judgment, *see, e.g.*, *McDaniel* v. *Barresi*, 402 U.S. 39 (1971), that question need not be reached. Federal courts, which are clearly competent to make such determinations, *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 419-20 (1977); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971), have made repeated findings of racial discrimination in both cases. *Vanguards*, 753 F.2d at 483;

Sheet Metal Workers, 753 F.2d at 1186; 565 F.2d at 36 n.8; 532 F.2d at 825.

b. Enlarging the Pool of Applicants

Affirmative action in the private sector has enlarged the pool of talent from which employers can draw. As a result, there have been increases in productivity and improvement of customer relations. *See* Fisher, *Businessmen Like to Hire By the Numbers*, Fortune, Sept. 16, 1985, at 28. In *Detroit Police Officers' Association* v. *Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981), the Sixth Circuit recognized that affirmative action can increase productivity and improve public relations in the public sector as well. The court found that in Detroit the presence of black police officers, who had long been excluded from police work by racial discrimination in hiring, generated public support and cooperation from the city's large black community and contributed to crime prevention. 608 F.2d at 695.

c. Role Model

Municipalities also have an important interest in setting an example for private employers and the community. *See* H.R. Rep. No. 238, 92nd Cong., 1st Sess. (1971), *reprinted in* 1972 U.S. Code Cong. & Ad. News 2137, 2153. The failure of highly visible government agencies to eliminate vestiges of discrimination in their work forces undermines the government's claim to "represent all the people equally." *Id.* NCBM's members, therefore, are uniquely positioned to assume a leadership role in eradicating the effects of past discrimination in public and private employment.

d. Preserving Public Order

Cities need to preserve racial peace and public order through affirmative action. New York and Cleveland, like

the cities represented by NCBM's members, have the same obligation. As the discussion below demonstrates, lack of equal employment opportunities historically has been a cause of unrest in major urban areas in this country.

(i) Civil Disorder and its Causes

Race riots in America have long had their roots in unemployment and employment discrimination. The New York Draft Riots of July 1863 ". . . had their origin largely in a fear of black labor competition which possessed the city's Irish unskilled workers." Man, *Labor Competition and the New York Draft Riots of 1863*, 36 The Journal of Negro History, October 1951, at 375. A similar fear contributed to several other riots, including those in East St. Louis in 1917 and those in Washington, D.C. and Chicago in 1919. *See* J. Baskin, Urban Racial Violence in the Twentieth Century 22-23 (Glencoe Press, 1969); Gompers, *East St. Louis Riots—Their Causes*, 24 American Federationist, August 1917, at 621-26. The June 1943 riot in Detroit, which left 34 dead and over 1000 injured, originated, at least in part, in racial discrimination suffered by blacks who, along with whites, had gone to Detroit to work in war-related industries. A. Lee & N. Humphrey, Race Riot 92 (New York: Dryden Press, 1943).

The 1960's saw social upheaval in many American cities. The riots in Harlem in the summer of 1964 were traced to black unemployment and the income disparity between black families and white families. *Harlem: Hatred in the Streets*, Newsweek, August 3, 1964, at 16-20. During the summer of 1967, the cities of Newark, Detroit, Milwaukee, Cincinnati and Boston had large-scale riots. Other cities witnessed serious, though smaller, public disorders. Rossi, Berk, Boesel, Edison & Grover, Between White and Black—The Faces of American Institutions in the Ghetto, Supple-

mental Studies for the National Advisory Commission on Civil Disorders 77-79 (Frederick A. Praeger, Pubs. 1968).

In July 1967, President Lyndon Johnson empanelled the National Advisory Commission on Civil Disorders to determine the causes of these riots and how they could be prevented in the future. The National Advisory Commission on Civil Disorders, Report of the National Advisory Commission on Civil Disorders 1 (Mar. 1, 1968) ("Commission Report"). One of the major findings of this Commission was, in the broadest terms, that:

> Unemployment and underemployment are among the most persistent and serious grievances of our disadvantaged minorities. The pervasive effect of these conditions on the racial ghetto is inextricably linked to the problem of civil disorder.

Id. at 231. This finding was based upon the Commission's investigation and over 1200 interviews which it conducted shortly after the disorders. Of all the factors found to be causes of the riots, including police practices, housing, and white attitudes, only unemployment, underemployment and/or employment discrimination were found to be a cause in all twenty cities investigated. *Id.* at 81-83. Significantly, discrimination by unions was a major grievance among respondents in thirteen of the cities surveyed and discrimination by local and state governments was cited as a serious problem by respondents in nine of the cities surveyed. *Id.* at 82.

The causal relationship of unemployment and poverty to urban riots is well documented. Rossi, *supra*, at 95-96; *see* Campbell & Schuman, Racial Attitudes in Fifteen American Cities, Supplemental Studies for the National Advisory Commission on Civil Disorders 48 (Frederick A. Praeger, Pubs. 1968). The Commission found that the

typical rioter, though better educated than the non-rioter, ". . . was more likely to be working in a menial or low status job as an unskilled laborer. If he was employed, he was not working full time and his employment was frequently interrupted by periods of unemployment." Commission Report, *supra*, at 73. The Commission found, on this point, that "[the rioter] feels strongly that he deserves a better job and that he is barred from achieving it, not because of lack of training, ability, or ambition, but because of discrimination by employers." *Id.* A supplemental study to the Commission Report corroborated the accuracy of this profile. The supplemental survey indicated that 71 percent of blacks thought employment discrimination was a problem and 50 percent of blacks viewed discrimination by their city government as prevalent. Campbell & Schuman, *supra*, at 23.

The reality of these perceived employment difficulties was borne out by the statistics. Unemployment rates for blacks were at least double those for whites in all Census Bureau categories in 1967. Commission Report, *supra*, at 124. The Commission noted the low-status and low-paying nature of most jobs held by blacks, finding that black men were more than three times as likely as whites to be in unskilled or service jobs which pay far below average. *Id.*

Recent data compiled by the United States Department of Labor and the Census Bureau indicate that severe problems of unemployment and underemployment among minorities and a racially-based income disparity persist. In September 1985, for example, the unemployment rate for whites was 6.1 percent, as compared with a 15.3 percent unemployment rate among blacks and a 10.4 percent unemployment rate among persons of Hispanic origin. United States Department of Labor, 108 Monthly Labor Review 73 (Nov. 1985). In addition, 36 percent of black workers

are classified by the Census Bureau as blue collar, while only 31 percent of white workers are so classified. Almost 54 percent of whites are classified as white collar, while only 36 percent of blacks are classified as such. Bureau of the Census, U.S. Department of Commerce, Current Population Reports, Consumer Income, ser. P-60, 1981, Table 52, at 184 (1982). Furthermore, the $27,686 mean income for whites families dwarfs the $18,833 mean income for Hispanic families and the $15,432 mean income for black families. Bureau of the Census, U.S. Department of Commerce, Money, Income and Poverty Status of Families and Persons in the United States, ser. P-60, 1984, at 10 (Aug. 1985).

The persistence of minority unemployment and underemployment, a racially-based income disparity, and continued racial discrimination in public employment, as evidenced all too clearly by the findings in the cases at bar, suggest that the Commission's findings regarding the causes of and cures for urban unrest have not lost their high relevance.

(ii) Prevention of Civil Disorder

After determining that employment problems were a major cause of the race riots in 1967, the National Advisory Commission on Civil Disorders made recommendations for national action to prevent similar civil disorders from recurring. The Commission proposed a comprehensive national policy to address the problems of black unemployment and underemployment. Job creation in both the public and private sectors was recommended, as were training programs. The Commission also urged opening of the existing job structure by eliminating arbitrary barriers to employment. Commission Report, *supra*, at 231-36. As part of this national policy, and particularly pertinent to *Sheet Metal Workers*, the Commission recommended:

> Linking enforcement efforts with training and other aids to employers and unions, so that affirmative action to hire and promote may be encouraged in connection with investigation of both individual complaints and charges of broad patterns of discrimination.

Id. at 234. The Commission stated further that "[t]he efforts of the Department of Labor to obtain commitments from unions to encourage Negro membership in apprenticeship programs are especially noteworthy and should be intensified." *Id.*

The Commission also recommended job creation for blacks, stating that it strongly recommended " . . . that local governments undertake a concerted effort to provide substantial employment opportunities for ghetto residents." *Id.* at 153. To accomplish this goal, the Commission suggested " . . . that municipal authorities review applicable civil service policies and job standards and take prompt action to remove arbitrary barriers to employment of ghetto residents." *Id.*

New York and Cleveland have endorsed reasonable affirmative action plans as an effective method of stemming some of the historical causes of urban unrest, as outlined by the Commission. This Court has long abstained from interference with the states' traditional "police powers." *See Charles River Bridge* v. *Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837). In addition, local leaders are necessarily more attuned to the needs of their communities than this Court. As a result, this Court should not substitute its judgment for that of local leaders who, after careful study and lengthy negotiation, have decided to implement affirmative actions plans. *See United Steelworkers of America* v. *Weber*, 443 U.S. 193, 208 (1979) (quoting 110 Cong. Rec. 15893

(1964) (remarks of Rep. MacGregor) (problems raised by such controversial issues as preferential treatment in employment "are more properly handled at a governmental level closer to the American people and by communities . . ."); *cf. Bakke*, 438 U.S. at 404 (Blackmun, J.) ("Programs of admission to institutions of higher learning are basically a responsibility for academicians and for administrators and the specialists they employ. The judiciary, in contrast, is ill-equipped and poorly trained for this.").

3. *The Affirmative Action Plans Are Reasonable, Narrowly-Tailored and Temporary.*

To eliminate sucessfully the vestiges of past discrimination, employers must be permitted to implement race-conscious hiring and promotion schemes. The Cleveland Fire Department's race-conscious promotion plan in *Vanguards* and the membership goal proposed in *Sheet Metal Workers* are critical in this regard.

The plans are not permanent. They are "not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." *Weber*, 443 U.S. at 208. The *Vanguards* plan will remain in effect only for four years, 753 F.2d at 485, and the *Sheet Metal Workers* plan will remain in effect only until Local 28 ends its contumacious resistance to court orders and permits the elimination of the effects of past discrimination, 753 F.2d at 1187.

Nor will the plans result in the hiring of unqualified persons, risking stigmatization of minority workers. As the Eighth Circuit has recognized: "The absence—not the presence—of affirmative action stigmatizes minority groups, by perpetuating the disadvantages of minorities. . . . Where the applicant is qualified, the risk of stigma is considerably less because presumably the person can perform the task

adequately." *Valentine*, 654 F.2d at 511. The *Vanguards* plan, in fact, allows a reduction of the percentage of promotions reserved for minorities if an insufficient number of "qualified" minorities is available. 753 F.2d at 485.

In addition, the interests of non-minority workers will not be trammelled. Petitioners are white male workers. Such non-minorities are rarely stigmatized by the operation of a racial preference. The *Vanguards* plan, though it arguably diminishes non-minority workers' expectations with respect to promotion, does not bar their advancement. 753 F.2d at 485. During phase one of the plan, all promotions are made by coupling the highest ranking minority and non-minority candidates. Thereafter, Cleveland is to maintain a specific percentage of minority firefighters at each grade level in accordance with future promotions examinations. Even then, if there is an insufficient number of "qualified" minority candidates, the percentage goals can be reduced by the City to the extent necessary for the safe and efficient operation of the Fire Department. 753 F.2d at 485. Similarly, the *Sheet Metal Workers* plan does not unnecessarily affect the rights of any readily ascertainable group of non-minority employees. 753 F.2d at 1187. Thus, there will be no stigmatization of non-minorities who have failed to be hired or promoted.

When affirmative action relief is designed to eliminate the effects of past discrimination, it may impinge on the settled expectations of theoretically innocent parties whether or not the affected non-minorities oppose the remedy. *Fullilove*, 448 U.S. at 484. The non-minorities need not themselves be guilty of discrimination. *Id.* at 484-85. However, it may reasonably be assumed that some or all of those adversely affected by the remedial action previously benefitted from their non-minority status. *Id.* at 485. In any event, as Chief Justice Burger has stated, "[w]hen effectuat-

ing a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible." *Id.*

B. The Affirmative Action Plans Are Valid Means of Enforcing the Policy and Command of the Thirteenth Amendment and the Civil Rights Statutes Promulgated Thereunder.

This Court has held that the thirteenth amendment and 42 U.S.C. §§ 1981 and 1982 create broad powers in Congress and the federal courts to remedy racial discrimination. The instant cases involve court-ordered remedies that mitigate the effects of long-standing systematic discrimination. Under its thirteenth amendment power to enforce the prohibition against slavery, Congress passed §§ 1981 and 1982 as part of the 1866 Civil Rights Act. Section 1981 prohibits racial discrimination, *inter alia*, in public employment. Section 1982 prohibits racial discrimination in the renting, leasing, and ownership of real property.

This Court recently noted that to understand the purpose and reach of these statutes, "we must be mindful of the 'events and passions of the time' in which the law[s] [were] forged." *General Building Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 386 (1982) (quoting *United States* v. *Price*, 383 U.S. 787, 803 (1966)). In reviewing the historical context, one commentator has noted that "[p]roponents hoped that passage of the thirteenth amendment would eliminate sectional strife and hatred." Buchanon, *The Quest for Freedom: A Legal History of the Thirteenth Amendment*, 12 Houston L. Rev. 1, 11 (1974). NCBM has a similar interest in promoting racial equality and reducing racial tensions in urban areas.

This Court has consistently construed the thirteenth amendment and the 1866 Civil Rights Act as sweeping

prohibitions against racial discrimination, as well as broad grants of remedial power available to prevent or correct the effects of discrimination. The remedies available under Title VII and the Civil Rights Act of 1866 " 'augment each other and are not mutually exclusive.' " *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 459 (1975) (quoting H.R. Rep. No. 238, 92nd Cong., 1st Sess. 19 (1971)); *accord Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). The power to fashion effective remedies for racial discrimination under the thirteenth amendment is even broader than such power under the fourteenth amendment. *Civil Rights Cases*, 109 U.S. 3, 23 (1883); *see Clyatt* v. *United States*, 197 U.S. 207, 217 (1905). As declared in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968):

> "By its own unaided force and effect," the Thirteenth Amendment "abolished slavery, and established universal freedom." *Civil Rights Cases*, 109 U.S. 3, 20. Whether or not the amendment *itself did any* more than that—a question not involved in this case—it is at least clear that the Enabling Clause of that Amendment empowered Congress to do much more. For that clause clothed "Congress with power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.*"

Id. at 439 (emphasis in original); *accord Griffin* v. *Breckenridge*, 403 U.S. 88, 105 (1971).

Relief should, within the law, be as drastic as necessary to redress the wrongs resulting from racial discrimination. *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 239 (1969).*

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* *See, e.g., McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 287-89 (1976) (invalidating employment discrimination

(footnote continued on following page)

In view of this Court's understanding that "the existence of a statutory right implies the existence of *all* necessary and appropriate remedies," *Sullivan*, 396 U.S. at 239 (emphasis added), the Court should recognize the thirteenth amendment, and the statutes passed pursuant to its enabling power, as an independent basis supporting the affirmative action plans at issue.

C. A Municipality's Authority to Promulgate an Affirmative Action Plan in Public or Publicly-Funded Employment Is Drawn From the Tenth Amendment.

In *National League of Cities* v. *Usery*, 426 U.S. 833, 845 (1976), this Court held that a state's ability to determine the terms and conditions of public employment is an "undoubted attribute of state sovereignty."* That principle supplies guidance here as to municipal decisions regarding terms and conditions of public employment.

This Court has recently proclaimed that "[t]he essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal no matter how unorthodox or unnecessary anyone else—including the judiciary—

(footnote continued from preceding page)

against whites and non-whites under § 1981); *Runyon* v. *McCrary*, 427 U.S. 160, 172-73 (1976) (same); *Sullivan*, 396 U.S. at 236 (invalidating restrictions on the ability of non-whites to own and convey real estate under § 1982); *Jones*, 392 U.S. at 414 n.13 (same).

* *But cf. EEOC* v. *Wyoming*, 460 U.S. 226, 238 n.11 (1983) (". . . we are not to be understood to suggest that *every* state employment decision aimed simply at advancing a generalized interest in efficient management—even the efficient management of traditional state functions—should be considered to be an exercise of an 'undoubted attribute of state sovereignty.'") (emphasis added).

deems state involvement to be."* *Garcia* v. *San Antonio Metropolitan Transit Authority*, 105 S. Ct. 1005, 1015 (1985). In *Fullilove*, Chief Justice Burger, quoting Justice Brandeis, recognized the significance of this concept in upholding an affirmative action plan:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation.

448 U.S. at 491 (quoting *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). Chief Justice Burger's quotation of Justice Jackson also bears repeating:

> Each such decision [striking down legislative social experimentation and compromise] takes away from our democratic federalism another of its defenses against domestic disorder and violence. The vice of judicial supremacy, as exerted for ninety years in the field of policy, has been its progressive closing of the avenues to peaceful and democratic conciliation of our social and economic conflicts.

Fullilove, 448 U.S. at 490-91 (quoting R. Jackson, The Struggle for Judicial Supremacy 321 (1941)).

That is the essence of the NCBM's position here. Municipalities, in our federal scheme, should be free to take whatever fair and reasonable steps are necessary to combat the disabling effects caused by their histories of racial discrimination in employment.

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* NCBM does not suggest, of course, that the tenth amendment could save legislation prohibited by the subsequently enacted fourteenth amendment. *Hunter* v. *Underwood*, 105 S. Ct. 1916, 1923 (1985).

POINT II

Municipalities Have an Affirmative Obligation Under the Fourteenth Amendment to Eradicate Lingering Vestiges of Racial Discrimination in Public and Publicly-Funded Employment.

Not only are the affirmative action plans at issue constitutionally permissible, they also may be required. The fourteenth amendment demands more from municipalities than merely ending past official discrimination; they must take affirmative steps to ensure equal opportunity in public and publicly-funded employment. This Court's rulings in the area of education are instructive in defining the duty of a state, or in this case its political subdivision, a municipality, to eliminate the effects of past discrimination in public employment.

In *Green* v. *County School Board*, 391 U.S. 430 (1968), this Court ruled that a school board which has historically operated a dual school system is "clearly charged with [an] *affirmative* duty to take whatever steps might be necessary to convert to a unitary [school] system in which racial discrimination would be eliminated root and branch." *Id.* at 437-38 (emphasis added). Similarly, in *Swann* v. *Charlotte-Mecklenburg Board of Education*, this Court recognized that a local government has the duty to "eliminate from the public schools all vestiges of state-imposed segregation." 402 U.S. at 15; *see Columbus Board of Education* v. *Penick*, 443 U.S. 449, 458-61 (1979); *Milliken* v. *Bradley*, 433 U.S. 267, 281-83 (1977).

A municipality's obligation in public employment should be at least as rigorous as its responsibility in education. A primary justification for promoting equal educational opportunities is the role education plays in "preparing [children] for later professional training." *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954), and "provid[ing] the basic tools by which individuals might lead economically productive lives. . . ." *Plyler* v. *Doe*, 457 U.S. 202, 221 (1982). It would be a cruel irony to provide a child with a good education, yet deny him or her the opportunity to make full use of that education in a public service job.*

POINT III

Affirmative Race-Conscious Relief Is Valid Under Title VII.

A. Since a Municipality's Affirmative Obligation Under the Fourteenth Amendment Can Be Met Through an Affirmative Action Plan, and Title VII Was Extended to Cover State and Municipal Employees to Effectuate the Purposes of the Fourteenth Amendment, Such a Plan Cannot Violate Title VII.

An affirmative action plan is, in many circumstances, the most effective method for a municipality to meet its obligation under the fourteenth amendment to root out racial discrimination in public and publicly-funded employment. *See Bakke*, 438 U.S. at 362 (Brennan, White, Marshall, Blackmun, JJ.); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. at 46; *Brooks* v. *Beto*, 366 F.2d 1, 24 (5th Cir. 1966), *cert. denied*, 386 U.S. 975 (1967). Thirty-five years ago, Justice Frankfurter, dissenting in *Dennis* v. *United States*, 339 U.S. 162, 184 (1950), declared that "there is no greater inequality than the equal treatment of

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* When coverage of Title VII was extended to state and local government employees in 1972, it was recognized that "[s]tate and local governments ha[d] failed to fulfill their obligation to assure equal job opportunity." S. Bill No. 2515, 92nd Cong., 2d Sess., *reprinted in* Legislative History of the Equal Employment Opportunity Act of 1972, at 1173 (BNA 1973) (remarks of Sen. Javits) (quoting U.S. Comm'n on Civil Rights, 1969 Report on Equal Opportunity in State and Local Government at 10).

unequals." By 1971, this Court transformed the theory of Justice Frankfurter's dissent into law by holding that "[j]ust as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy." *Swann*, 402 U.S. at 46. Race-conscious practices have often been upheld by this Court since *Swann*.*

When Title VII was amended in 1972, Pub. L. No. 92-424, 86 Stat. 688, affirmative action was recognized by Congress as a fundamental remedial principle of Title VII. Not only did Congress reject amendments to Title VII which would have precluded the use of race-conscious remedies, 118 Cong. Rec. 4918 (1972), but both the House and Senate reports cited, with approval, judicial decisions upholding affirmative action. *See* S. Rep. No. 415, 92nd Cong., 1st Sess. 8 n.4 (1971); H.R. Rep. No. 238, 92nd Cong., 1st Sess. 5 n.1 (1971), *reprinted in* 1972 U.S. Code Cong. & Ad. News at 2141 n.1. In fact, the House report explicitly stated that "[a]ffirmative action is relevant not only to the enforcement of Executive Order 11246 but is equally essential for more effective enforce-

* *See Fullilove*, 448 U.S. at 476-78 (upholding race-conscious statute designed to prevent perpetuation of past discrimination in allocation of government contracts to minority-owned businesses); *Bakke*, 438 U.S. at 320 (Powell, J., concurring in judgment) (permitting consideration of racial criteria in medical school admissions to compensate for effects of past discrimination); *United Jewish Orgs. v. Carey*, 430 U.S. 144, 161 (1977) (plurality opinion) (upholding race-conscious redistricting plan to eliminate effects of past electoral discrimination); *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (upholding preferential hiring to eradicate effects of past discrimination in employment); *cf. Califano* v. *Webster*, 430 U.S. 313, 318-20 (1977) (per curiam) (upholding sex-based preference in social security to redress long standing disparate treatment of females); *Kahn* v. *Shevin*, 416 U.S. 351, 353-55 (1974) (upholding property tax exemption for widows, but not widowers, because spousal loss historically imposed a disproportionately heavy burden on widows).

ment of Title VII in remedying employment discrimination." *Id.* at 16, 1972 U.S. Code Cong. & Ad. News at 2151.

A municipality, therefore, can meet its positive obligation under the fourteenth amendment to eliminate the effects of past discrimination through an affirmative action plan. Title VII was extended to serve the purposes of the fourteenth amendments. *See Weber*, 443 U.S. at 203; *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 453 n.9 (1976). Thus, to construe Title VII as invalidating the affirmative action plans at issue would be to ignore the purposes that Title VII was designed to achieve.

B. Affirmative, Voluntary Race-Conscious Relief Is Permissible for Public Employers.

In *United Steelworkers of America* v. *Weber*, this Court upheld under Title VII a voluntary race-conscious affirmative action plan. Like the plans here, the plan upheld in *Weber* (1) did not require the discharge of non-minority workers and their replacement with minorities; (2) did not create an absolute bar to the advancement of non-minorities; and (3) was temporary in nature and designed to terminate when the underutilization of minorities had been corrected. 443 U.S. at 208.

In contrast to *Weber*, *Sheet Metal Workers* did not involve a voluntary affirmative action plan. While the plan is supported by the City and State of New York, among others, it was issued in response to the petitioners' repeated violations of court orders and, while reasonable under the criteria established in *Weber*, can be affirmed by looking solely to the District Court's equitable authority to enforce its own orders.*

* Federal district courts have inherent power to hold a party in civil contempt upon clear and convincing proof of noncompliance with a court order. *Powell* v. *Ward*, 643 F.2d 924, 931 (2d Cir.).

(footnote continued on following page)

A difference between the affirmative action plan approved in *Weber* and that at issue in *Vanguards* is that *Weber* involved a private employer while *Vanguards* involves a public employer. This Court, however, has recognized that when Congress extended Title VII coverage to public employees in 1972, it "expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike." *Dothard* v. *Rawlinson*, 433 U.S. 321, 331 n.14 (1977). The Equal Employment Opportunity Commission recognized "the clear Congressional intent to encourage voluntary affirmative action." 29 C.F.R. § 1618.1 (1985).* Disallowance of the public em-

(footnote continued from preceding page)

cert. denied, 454 U.S. 832 (1981). Moreover, federal district courts have broad discretion to fashion appropriate coercive remedies for noncompliance in the face of civil contempt, based on the nature of the harm and the probable effect of alternative sanctions. *United States* v. *United Mine Workers*, 330 U.S. 258, 303-04 (1947); *N.A. Sales Co.* v. *Chapman Industries Corp.*, 736 F.2d 854, 857 (2d Cir. 1984). It is not necessary to show that petitioners disobeyed the District Court's order willfully. *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949). Since the purpose is remedial, the petitioners' motives in doing the prohibited act are irrelevant. *Id.*

The petitioners in *Sheet Metal Workers* were found in contempt for repeatedly failing to comply with the two affirmative action plans. The Second Circuit held that there was clear and convincing evidence showing that petitioners "had not been reasonably diligent in attempting to comply with the orders of the court and the administrator." 753 F.2d at 1182. In fact, as the Court of Appeals noted, the petitioners "virtually concede[d] the facts showing those violations," but offered no acceptable arguments to excuse their noncompliance. *Id.* at 1179-81. This Court should not countenance petitioners' contumacious conduct; the integrity of the judicial power should be upheld by affirming the order finding petitioners in contempt.

* EEOC interpretations of Title VII, being those of the agency charged with enforcing the statute, are "entitled to great deference." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 431 (1975) (quoting *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-34 (1971)), and should be followed absent "compelling indications that [they are] wrong." *Miller* v. *Youakim*, 440 U.S. 125, 145 n.25 (1979) (quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969)).

ployment affirmative action plan in *Vanguards* would frustrate the purposes of Title VII by discouraging the voluntary settlement of employment discrimination claims. *See Carson* v. *American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981); *Bakke*, 438 U.S. at 364 n.8; *Alexander* v. *Gardner-Denver Co.*, 415 U.S. at 44. Municipalities, even more than private employers, should be able voluntarily to accomplish federal government goals. *See United Jewish Orgs.* v. *Carey*, 430 U.S. at 162-63. State and municipal action is particularly important in employment discrimination because Title VII reserves for states the right to enforce the Civil Rights Act through state agencies. *See* 42 U.S.C. § 2000e-5(b)(c) (1982); 1972 U.S. Code Cong. & Ad. News. at 2154. Indeed, the importance of state and local action in this area grows as the federal government's role diminishes. *See, e.g.*, Pear, *Rights Chief Assails Hiring Goals as Failure*, N.Y. Times, Nov. 1, 1985, § A, at 19, col. 1 (Reagan Administration intends to dismantle affirmative action program for federal contractors).

If the plans were disallowed, public employers would be in an untenable position. On the one hand, public employers would be faced with liability to minorities for past discrimination. *Monell* v. *Department of Social Services*, 436 U.S. 658, 694-95, 701 (1978). On the other, public employers would confront liability to non-minorities for voluntary preferences adopted to ameliorate the effects of past discrimination against minorities. *Weber*, 443 U.S. at 209-10 (Blackmun, J., concurring); *Weber* v. *Kaiser Aluminum & Chemical Corp.*, 563 F.2d 216, 230 (5th Cir. 1977) (Wisdom, J., dissenting), *rev'd sub nom. United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979). The EEOC has found "that by enactment of Title VII Congress did not intend to expose those who comply with the Act to charges that they are violating the very statute

they are seeking to implement." 29 C.F.R. § 1618.1 (1985).

C. The *Stotts* Decision Does Not Prohibit Affirmative Race-Conscious Relief.

This Court did not rewrite Title VII in *Firefighters Local Union No. 1784* v. *Stotts*, 104 S. Ct. 2576 (1984), so as to bar all affirmative action, except victim-specific relief. This Court was careful to note that the discrete issue presented in *Stotts* was the District Court's authority to override a *bona fide* seniority system to require layoffs of more senior whites, in the absence of a showing of intentional discrimination. *Id.* at 2585. *Stotts* is limited to competitive seniority cases involving *bona fide* seniority systems and does not bar all race-conscious prospective relief. *Stotts* is both factually and legally distinguishable from the cases at bar.*

First, *Stotts* did not involve a finding of intentional discrimination. In *Vanguards*, however, the District Court expressly found "a historical pattern of racial discrimination in promotions in the City of Cleveland Fire Department." 753 F.2d at 483. Similarly, in *Sheet Metal Workers*, the District Court found that the union had purposefully discriminated against nonwhites in violation of Title VII. 753 F.2d at 1186.

Second, *Stotts* concerned a court-ordered plan, which was imposed over the objections of the City of Memphis. The Court explicitly refused to decide whether the City

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* A number of courts have limited *Stotts* to its facts and narrow holding. *See Devereaux* v. *Geary*, 765 F.2d 268, 271-75 (1st Cir. 1985); *Paradise* v. *Prescott*, 767 F.2d 1514, 1527 (11th Cir. 1985); *Kromnick* v. *School District of Philadelphia*, 739 F.2d 894, 911 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 782 (1985) (*Stotts* limited to orders implicating § 703(h) of Title VII); *Van Aken* v. *Young*, 750 F.2d 43, 44-45 (6th Cir. 1984) (*Stotts* does not affect voluntary plans or affirmative action in which seniority is not at issue).

could have voluntarily adopted such a provision. 104 S. Ct. at 2590. There was no suggestion in *Stotts* that the Court was overruling *Weber's* endorsement of voluntary affirmative action.*

Third, in *Stotts*, this Court explicitly restricted the victim-specific limitation of section 706(g) to "make-whole" relief. 104 S. Ct. at 2589. Section 706(g) does not limit the authority of a court to award prospective, race-conscious relief designed to dismantle prior patterns of job segregation and ensure the prospective integration of an employer's workforce by enhancing future employment opportunities for minorities. The last sentence of section 706(g), which provides that a court cannot compel an employer to reinstate, hire, promote or give back pay to any individual if the employer has taken action against that individual for a non-discriminatory reason, does not address the broader issue of prospective relief.

Finally, *Stotts* was in essence a case about the scope of a District Court's power to amend a consent decree over the objections of one of the parties. 104 S. Ct. at 2594-95 (Stevens, J., concurring in the judgment). The entire discussion in *Stotts* centers on the District Court's improper award of "make-whole" relief. Unlike the injunction in

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* On January 7 and 8, 1982, the District Court held an evidentiary hearing specifically to consider intervenor Local 93's objections to the 1981 proposed consent decree. At a second evidentiary hearing held on April 27, 1982, the District Court indicated that the intervenor's primary objection to the decree was its use of racial "quotas." 753 F.2d at 482. Although the proposed consent decree ultimately adopted by the District Court was not agreed to by Local 93, its objection was the same as that made at the April 1982 hearing: the use of racial goals, which it characterized as "quotas." *Id.* at 483. Local 93 has had its day in court. The issue is not whether every affected party consented to the consent decree, but rather, as was true here, whether the consent decree is constitutionally and statutorily authorized in a context where every party was heard or had an opportunity to be heard.

Stotts, which had the effect of shifting the impact of the layoffs to other identifiable individuals, the goals at issue in the two cases at bar do not have the effect of depriving any particular individual of his job or even of an employment opportunity.

An expansive interpretation of *Stotts* has no basis in the text of the opinion and would be contrary to Title VII's legislative history, which reflects an endorsement of affirmative action.

CONCLUSION

For the foregoing reasons, the National Conference of Black Mayors, as *amicus curiae*, respectfully prays that the judgments of the Second and Sixth Circuits be affirmed.

Dated: January 2, 1986

Respectfully submitted,

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APPENDIX

APPENDIX OF RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment X:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

United States Constitution, Amendment XIII:

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

United States Constitution, Amendment XIV, Sections 1 and 5:

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2. [§ 703]: Unlawful Employment Practices—Employer Practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

• • •

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

42 U.S.C. 2000e-5(g) [§ 706(g)]:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the

unlawful employment practice), or any other equitable relief as the court deems appropriate. . . .

No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

42 U.S.C. § 1981: Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

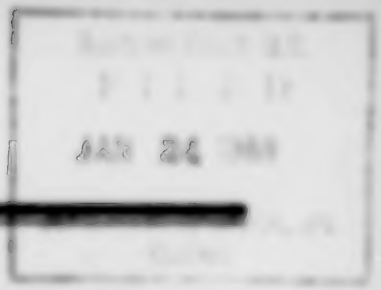
42 U.S.C. § 1983: Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

AMICUS CURIAE

BRIEF

No. 84-1999



IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, C.L.C.,
Petitioner,

v.

CITY OF CLEVELAND, *et. al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF AMICI CURIAE THE CITY OF ATLANTA AND THE MINORITY BUSINESS ENTERPRISE LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF RESPONDENTS

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BRIEF OF AMICI CURIAE THE CITY OF ATLANTA AND THE MINORITY BUSINESS ENTERPRISE LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF RESPONDENTS[1]

INTEREST OF AMICI CURIAE

Amicus City of Atlanta long has been committed to voluntary affirmative action as a means of rectifying past discrimination. Like the City of Cleveland, the City of Atlanta has utilized affirmative action plans in its police

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[1] Amicus City of Atlanta files this brief pursuant to Rule 36.1 of the Rules of this Court. Amicus MBELDEF files pursuant to the letters of consent lodged with the Clerk of this Court.

and fire departments, through agreements embodied in consent decrees.[2] Atlanta also diligently has sought, despite difficulties under state law, to establish an affirmative action program for public contracting.[3]

Amicus Minority Business Enterprise Legal Defense and Education Fund, Inc. (MBELDEF), a nonprofit corporation, was established in 1980 to assist minority business enterprises in achieving greater participation in the American economy. MBELDEF members, totalling over 650 minority businesses nationwide, have actively participated in federal, state, and local programs designed to further minority enterprise. MBELDEF and affiliated organizations have assisted state and local governments considering adoption of such programs, and MBELDEF has participated as an amicus curiae in cases addressing the constitutionality and implementation of these programs.

Amici City of Atlanta and MBELDEF thus have a common interest in this case: both amici have been active in implementing Congress' commitment to rectifying past discrimination in this country; both favor *voluntary* action at the state and local government level designed to carry out that commitment; and both are concerned that such local governmental efforts will be significantly inhibited if they are not clearly approved by this Court in this case.[4] Amici therefore urge affirmance of the decision below.

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[2] *See* Afro-American Patrolmen's League v. Jackson, Civ. No. 18227 (N.D. Ga. consent decree entered June 13, 1980); Hunter v. City of Atlanta, Civ. No. C75-1609-A (N.D. Ga. consent decree entered Nov. 9, 1979).

[3] *See* American Subcontractors Ass'n, Georgia Chapter, Inc. v. City of Atlanta, No. D-20514 (Fulton Co. Super. Ct. filed Apr. 19, 1985); Georgia Branch, Associated General Contractors of America, Inc. v. City of Atlanta, 253 Ga. 397, 321 S.E.2d 325 (1984).

[4] As one commentator has observed, "it is impossible for public entities to determine in advance whether a contemplated affirmative action program would survive litigation." Jacobs, *Justice Out of Balance: Voluntary Race-Conscious Affirmative Action in State and Local Government*, 37 Vand. L.R. 1, 16 (1985).

SUMMARY OF ARGUMENT

This case raises essentially two questions. The first is whether Congress through Title VII and other pertinent legislation has permitted—if not affirmatively encouraged—voluntary programs by local governments designed to rectify past discrimination against minorities. The legislative history of Title VII and the Public Works Employment Act, as well as this Court's decisions in *Weber* and *Fullilove*, plainly indicate that Congress has endorsed such voluntary programs. And this is so even where, as here, the programs may disappoint the expectations of certain non-minorities. So long as a given voluntary program does not unnecessarily trammel the interests of affected non-minority individuals and otherwise meets the standards of *Weber*, it is well within the policies of Title VII.

The other question raised by this case is whether such a voluntary program, even though it is within the policies of Title VII, must nevertheless be deemed prohibited by Title VII solely because the program has been approved and embodied in a judicial consent decree. The answer to this question is surely no. Even if a city may not be *required* to adopt a remedial program except where necessary to make whole specifically identified victims of discrimination, a city is *permitted* to adopt a remedial program in far broader circumstances.

Thus, so long as the *Weber* standards are met, it is clear that a local government may adopt such a remedial program in any number of circumstances—by unilateral choice, or after negotiations with interested parties, or after threatened litigation by minorities, or in an out-of-court settlement of such a lawsuit. And, again, so long as *Weber* is satisfied, a city clearly may sustain such a

program in any of these circumstances even if the city is later sued by non-minorities objecting to the program. It makes nonsense of the language, policy, and legislative history of Title VII to conclude that a city may not adopt such a voluntary program simply because the objecting non-minority persons have not sued the city directly but have instead intervened in a suit initially brought by minorities. Indeed, if a consent decree is prohibited in such circumstances, it would mean that the policies of Title VII and the prerogatives of the city deviate according to the procedural fortuities of the case. Congress could not have intended such an anomalous result, and it should not be approved by this Court.

ARGUMENT

I. UNDER TITLE VII AS WELL AS OTHER PERTINENT LEGISLATION, CONGRESS HAS SPECIFICALLY ENDORSED VOLUNTARY ACTIONS BY STATE AND LOCAL GOVERNMENTS DESIGNED TO REMEDY PAST DISCRIMINATION AGAINST MINORITIES.

Congress intended Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1982), "to provide[] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-18 (1975). Toward that end, as this Court concluded in *United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979), Title VII allows employers to adopt voluntary, race-conscious affirmative action plans "to break down old patterns of racial segregation and hierarchy." *Id.* at 208. Under *Weber*, an affirmative action plan is lawful if it is designed to rectify the present effects of past discrimination, lasts only as long as necessary to achieve its purposes, and does not unduly impinge on the legitimate rights of majority employees. *Id.* at 208-09.

Through Title VII, Congress specifically intended to encourage public employers to take voluntary affirmative action to rectify past discrimination. As the House Report accompanying the Civil Rights Act declared, "there is reason to believe . . . that national leadership provided by the enactment of Federal legislation dealing with the most troublesome problems will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination." H.R. Rep. No. 914, 88th Cong., 1st Sess., 18 (1963) (emphasis added), *quoted in United Steelworkers of America* v. *Weber*, 443 U.S. at 204. Representative MacGregor emphasized that Title VII did not require "preferential treatment or quotas in employment" because "these controversial questions are more properly handled at a governmental level closer to the American people and by communities and individuals themselves." 110 Cong. Rec. 15893 (1964), *quoted in United Steelworkers of America* v. *Weber*, 443 U.S. at 209 n.7.

The 1972 amendments to Title VII, which extended to millions of public employees the same protections previously available only to private sector employees,[5] also extended the same freedoms to public and private employers alike. *See Bratton* v. *City of Detroit*, 704 F.2d 878, 884 (6th Cir. 1983), *cert. denied*, 464 U.S. 1049 (1984).[6] In adopting the 1972 amendments, Congress

[5] *See* Pantoliano v. New Hampshire Racing Commission, 390 F. Supp. 231, 238 (D.N.H. 1975).

[6] While *Weber* involved a private employer, lower federal courts have recognized that Title VII's authorization of voluntary affirmative action plans applies equally to plans devised by public employers. *See, e.g.*, Britton v. South Bend Community School Corp., 775 F.2d 794, 802 (7th Cir. 1985); *Bratton* v. *City of Detroit*, 704 F.2d at 882-84 (applying *Weber*). Properly tailored remedial plans adopted by public employers also are consistent with constitutional

recognized the history of discrimination in employment by state and local governments and the need for corrective action. Thus, during the debate on the Title VII amendments in 1972, Senator Williams quoted a report by the U.S. Commission on Civil Rights concluding that employment discrimination infected the public sector as well as the private sector: "'State and local governments have failed to fulfill their obligation to assure equal job opportunity. . . . Not only do State and local governments consciously and overtly discriminate in hiring and promoting minority group members, *but they do not foster positive programs to deal with discriminatory treatment on the job.*'" *Legislative History of the Equal Employment Opportunity Act of 1972* at 1114 (1972) ("Leg. Hist."); (quoting U.S. Commission on Civil Rights, "For All the People—By All the People" (1969)) (emphasis added).

Congress thus intended that the challenge of overcoming discrimination in public employment would be met through local initiative, rather than solely through federal enforcement. As Senator Taft emphasized: "How can we expect patterns of discrimination in private employment to be changed to promote full and equal employment of all Americans if Government itself does not set an example in this regard. . . . I feel very strongly that if any truly effective progress is to be made in this area, it will be made more as a matter of volition, more as a matter of example, than by means of compulsion, even though compulsion, or at least legal enforcement of the principle, may be necessary to effect progress." Leg. Hist. at 1167. Heeding Congress' message, a substantial number of state and local governments have adopted affirmative action plans, often formalized in consent decrees.[1]

If there be any doubt whatever that Congress intended Title VII as an endorsement of voluntary remedial steps by local governments, the intention of Congress in that statute must be interpreted in context with other "ongoing efforts directed toward deliverance of the century-old promise of equality of economic opportunity." *Fullilove* v. *Klutznick*, 448 U.S. 448, 463 (1980) (Burger, C.J., with White & Powell, JJ.). The minority business assistance provision of the Public Works Employment Act of 1977, 42 U.S.C. §6705 (1982), unquestionably confirms Congress' approval of affirmative action programs as remedial mechanisms, even where (as in *Weber*) the programs may benefit individuals other than specifically identified victims of discrimination. Furthermore, through the Public Works Employment Act Congress again encouraged state and local governments to take the lead in voluntary rectifying past discrimination against minority groups.

Thus, under Section 103(f)(2) of the Act, in order to obtain federal funds for local public work projects, a state or local government must give assurance that at least ten percent of the grant will be expended through "minority business enterprises," as defined in the Act. *Id.* §6705(f)(2). It is undeniable that, in operation, Section 103(f)(2) confers a statutory preference upon minority-owned firms that have not been specifically identified as victims of past discrimination in government contracting. *See Fullilove* v. *Klutznick*, 448 U.S. at 486-

equal protection guarantees. *See* Britton v. South Bend Community School Corp., 775 F.2d at 806-11; Devereux v. Geary, 765 F.2d 268, 274 & n.5 (1st Cir.), *petition for cert. filed*, 54 U.S.L.W. 3259 (1985); Janowiak v. Corporate City of South Bend, 750 F.2d 552, 561 (7th Cir. 1984); Kirkland v. New York State Dep't of Correctional Services, 711 F.2d 1117, 1130 (2d Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984); Stratton v. City of Detroit, 704 F.2d at 883-87.

[1] Like the City of Cleveland, the City of Atlanta and other jurisdictions have adopted affirmative action plans in settlement of suits by minority employees. Some 50 jurisdictions are following affirmative action plans embodied in consent decrees in cases originally brought by the Department of Justice. *See* NAACP Legal Defense & Educational Fund, Inc. v. U.S. Dep't of Justice, 612 F. Supp. 1143, 1145 (D.D.C. 1985).

97 (Burger, C.J., with White & Powell, JJ.); id. at 541 (Stevens, J., dissenting).

This Court upheld Section 103(f)(2), of course, over the challenge that its race-conscious provisions violated the equal protection guarantees of the fifth and fourteenth amendments. See id. at 492. Chief Justice Burger, joined by Justices White and Powell, emphasized that the program represented not an attempt "to give select minority groups a preferred standing in the construction industry," but rather "a remedial program to place them on a more equitable footing with respect to public contracting opportunities." Id. at 485-86 (Burger, C.J., with White & Powell, JJ.). The Chief Justice explained, moreover, that "[i]t is not a constitutional defect in this program that it may disappoint the expectations of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such 'a sharing of the burdens' by innocent parties is not impermissible." Id. at 484.

Justice Powell concurred, pointing out that the minority business provision had the same grounds as Title VII — Congress' mandate to "address directly the problems of discrimination in our society." Id. at 499 (Powell, J., concurring).[*] Justice Marshall, joined by Justices Brennan and Blackmun, also approved the minority business assistance plan, applauding Congress and the Court for "moving our society toward a state of meaningful equality of opportunity, not an abstract version of equality in which the effects of past discrimination would be forever frozen into our social fabric." Id. at 522 (Marshall, J.,

[*] Congress adopted both the 1972 amendments to Title VII and the minority business provision pursuant to its powers under Section 5 of the fourteenth amendment. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 n.9 (1976); Shuver v. Indiana University of Pennsylvania, 602 F.2d 1161, 1163 (3d Cir. 1979).

with Brennan & Blackmun, JJ., concurring in the judgment).

Equally important for purposes of this case, in passing Section 103(f)(2) Congress sought not only to assist minority enterprise directly, but also to stimulate state and local governments to take comparable initiatives. Representative Parren Mitchell, the sponsor of the provision, stated: "I think we must look at other States and cities around this country that have not really achieved the [public contracting] problem at all and do not have any lever on which to hang an operation designed to begin to redress this grievance that has been extant for so long. . . . By setting the tone at the Federal level, . . . what we do in terms of these local political subdivisions is to give them the added impetus to do those things which are right and fair." 123 Cong. Rec. 5330 (1977).

As Congress intended, state and local governments indeed have taken steps to rectify past discrimination in the public contracting field. Most recently, the United States Court of Appeals for the Fourth Circuit sustained a five-year program adopted by the City of Richmond that requires contractors to whom the city awards construction contracts to subcontract at least thirty percent of the dollar amount of the contracts to minority business enterprises. See J.A. Croson Co. v. City of Richmond, Nos. 85-1092(L), 85-1941 (4th Cir. Nov. 25, 1985). Applying the Fullilove standards, the court concluded that the Richmond plan was a constitutionally permissible undertaking to rectify the continuing anticompetitive effects of past discrimination. Slip op. at 12, 16. Although, like the program in Fullilove, the Richmond plan provided for race-conscious remedies other than mere make-whole relief, see slip op. at 41 (Wilkinson, J., dissenting), the court found that the use of the racial classifications extended "no further than the established need of remedying the effects of past discrimination." Id. at 25. Other state and local governments have taken similar actions, and

they have been similarly approved by the reviewing courts."

Thus, Section 1983(f)(2) and Title VII alike embody Congress' endorsement of voluntary action by state and local governments to set right past discrimination. That is the nature of the action taken by the City of Cleveland in this case. There is no question that Cleveland's action met the standards for such action, as described by this Court in *Weber* and *Fullilove*. The only remaining question is whether the procedural posture in which Cleveland took its action should render it barred by Title VII.

II. VOLUNTARY AFFIRMATIVE ACTION WHICH IS OTHERWISE PERMISSIBLE UNDER TITLE VII IS NOT RENDERED IMPERMISSIBLE SIMPLY BECAUSE IT IS IMPLEMENTED THROUGH A CONSENT DECREE.

Like the employer in *Weber*, the City of Cleveland in this case recognized the need for remedial measures to correct the effects of past discrimination in its Fire Department. The City therefore agreed voluntarily to adopt an affirmative action plan. For purposes of Title VII, the only difference between this case and *Weber* is that here,

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[9] *See* South Florida Chapter of Associated Gen. Contractors of America, Inc. v. Metropolitan Dade County, 723 F.2d 846 (11th Cir.), cert. denied, 105 S. Ct. 329 (1984); Ohio Contractors Ass'n v. Keip, 713 F.2d 167 (6th Cir. 1983); Associated Gen. Contractors of California, Inc. v. City & County of San Francisco, 629 F. Supp. 334 (N.D. Cal. 1985); Michigan Road Builders Ass'n, Inc. v. Milliken, 571 F. Supp. 173 (E.D. Mich. 1983) (also finding Title VII not violated); Southwest Washington Chapter, Nat'l Electrical Contractors Ass'n v. Pierce County, 109 Wash. 2d 169, 662 P.2d 1892 (Wash. 1983); United Building & Construction Trades Council v. City of Camden, 88 N.J. 337, 443 A.2d 148 (1982), *rev'd on other grounds*, 465 U.S. 208 (1984). *But see* Arrington v. Associated Gen. Contractors of America, 681 So.2d 893 (Ala. 1981), cert. denied, 455 U.S. 913 (1982) (state as well as federal grounds); Georgia Branch, Associated Gen. Contractors of America, Inc. v. City of Atlanta, 251 Ga. 197, 321 S.E.2d 325 (1984) (state law grounds).

the employer also agreed to formalize its voluntary affirmative action plan in a consent decree. But the presence of a consent decree does not alter the fact that the City agreed voluntarily to adopt an affirmative action plan. Nor does it change Title VII policy toward such a plan. Indeed, to distinguish between this case and *Weber* would lead to anomalous results.

Voluntary affirmative action plans ordinarily come under judicial scrutiny in two ways—either a plan followed by a lawsuit or a lawsuit followed by a plan. In the first situation, as in *Weber*, an employer develops an affirmative action plan on its own or in negotiation with employees. Through the plan, the employer usually seeks to achieve remedial benefits of affirmative action or to avert potential litigation by minority employees. Non-minority employees affected by the plan may thereafter bring an action to test the legality of the plan under Title VII, as interpreted in *Weber*. If the court determines that the plan fails to satisfy the *Weber* standard, the court will direct the employer to abandon or modify its affirmative action scheme. But if the court concludes that the plan is appropriately remedial and temporary and does not "unnecessarily trammel" the rights of affected employees, *United Steelworkers of America* v. *Weber*, 443 U.S. at 208, the court will approve the validity of the plan.

In the second situation, an employer may have been sued by minority employees alleging discriminatory employment practices. Like an employer seeking to avert a threatened lawsuit, the employer-defendant may choose voluntarily to settle the pending litigation by adopting an affirmative action plan to remedy past discrimination. In that event, the employer and the employee-plaintiffs may simply agree between themselves that the employer will adopt an affirmative action plan in return for dismissal of the lawsuit.[10] In these circumstances, the plan

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[10] Fed. R. Civ. P. 41(a)(1). *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 & n.15 (1974). *Compare* Fulgence v. J. Ray

could take effect without prior judicial scrutiny and, as in *Weber*, would be subject to a later Title VII challenge by affected non-minority employees.

Alternatively, as here, the terms of a proposed settlement may require judicial review because the parties have agreed to embody the settlement in a consent decree.[11] The district court then must determine whether the settlement, including the proposed affirmative action plan, is "fair, adequate and reasonable." *Cotton* v. *Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977). In considering this question, the district court must "undertake an analysis of the facts and the law relevant to the proposed compromise." *Id.* at 1330. Because the court cannot enter an unlawful decree,[12] it must determine whether the employer's proposed affirmative action plan is consistent with the remedial purposes of Title VII, *System Federation No. 91* v. *Wright*, 364 U.S. 642 (1961), and satisfies *Weber*'s protections of the interests of non-minority employees.[13] There is no question that the settlement in

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McDermott & Co., 642 F.2d 1297 (5th Cir. 1981); *with* Moody v. St. Louis Southwestern Ry., 634 F.2d 942 (5th Cir.), *cert. denied*, 452 U.S. 906 (1981). *See also* Gardner v. A.H. Robins Co., 747 F.2d 1140, 1149 (8th Cir. 1984) (court may not transform private settlement into consent decree without consent of the parties to the settlement).

[11] Settlements involving voluntary affirmative action plans also may come before the court for other reasons—because of the direct objections of intervenors adversely affected by the proposed plan, for example, or because of the court's responsibility under Rule 23(e), Fed. R. Civ. P., to approve the plan upon reasonable notice to class members. In each of these cases, the affirmative action plan is subject to some form of judicial review, but in each instance the plan remains the voluntary action of the employer.

[12] Williams v. Vukovich, 720 F.2d 909, 920 (6th Cir. 1983); United States v. City of Miami, 664 F.2d 435, 441 (5th Cir. 1981) (en banc) (per curiam) (Rubin, J., concurring in the per curiam).

[13] Kirkland v. New York State Dep't of Correctional Services, 711 F.2d at 1135-36; Williams v. Vukovich, 720 F.2d at 920,

this case in fact met the *Weber* requirements under Title VII."

Hence, if the City of Cleveland had adopted its plan prior to litigation and Petitioner then had brought suit challenging the plan under Title VII, *Weber* would have been dispositive and the case would surely not be before this Court. Nothing in Title VII justifies a different result simply because Petitioner is an intervenor in the suit, not a plaintiff, or because the district court rejected its contention by approving a consent decree rather than rendering a judgment on the merits. Whether a valid affirmative action plan is included in a private agreement or embodied in a consent decree, in either case the employer voluntarily has agreed to the plan. In either case, the plan is subject to judicial scrutiny.[14]

921-22; United States v. City of Miami, 664 F.2d at 441-42 (Rubin, J., concurring in the per curiam); *id.* at 452 (Gee, J., concurring in part & dissenting in part); *id.* at 460 (Frank M. Johnson, J., concurring in part & dissenting in part); Metropolitan Housing Development Corp. v. Village of Arlington Heights, 616 F.2d 1006, 1014 (7th Cir. 1980).

[14] The plan is designed to correct the effects of past discrimination. Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479, 485 (6th Cir. 1985). Indeed, the City admitted a history of discrimination. Petition for Certiorari at A29-30, and the district court found that evidence presented at the January and April 1982 hearings "reveal[s] a historical pattern of racial discrimination in promotions in the City of Cleveland Fire Department." Brief for City of Cleveland in Opposition to Petition for Certiorari at A3-4. At the same time, the plan does not "unnecessarily trammel" the rights of majority employees. It does not require discharge of any majority employee, nor does it require the hiring or promotion of unqualified minority firefighters. 753 F.2d at 485. The plan does not create a bar to the advancement of majority employees, and it will remain in effect for only four years. *Id.* Thus, the plan clearly satisfies the requirements of Title VII under *Weber*.

[15] The City may subsequently choose to adopt a new promotion scheme and so seek to modify the consent decree. Or non-minority employees—either represented by the union or otherwise—may

Nevertheless, Petitioner and its amici claim that the consent decree violates Section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g) (1982),[17] because it affords relief to persons who are not identified victims of unlawful discrimination. Brief for Petitioner at 19.[18] Similarly, the

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plaintiffs' claims did not bind the intervenors and did not require their assent. Instead, the district court afforded intervenors a full opportunity to present their claim that the City's affirmative action plan violated *Weber*. On *that* question, intervenors have been fully and fairly represented.

Finally, Petitioner and the Department insist that the consent decree interfered with the contractual rights of non-minority employees. Brief for Petitioner at 25-26; Brief for United States at 25-26. This claim is not before this Court, for despite an ample opportunity to do so, intervenors offered no proof of any contractual "seniority" rights with which the consent decree might be said to interfere. *See* Brief for Respondent Vanguards of Cleveland, Part V. Even if the City's voluntary affirmative action plan interfered with contractual rights, the affected non-minority employees are protected, for they may retain their cause of action against the City for breach of contract. *See* W. R. Grace & Co. v. Local Union No. 759, International Union of Rubber Workers, 461 U.S. 757 (1983). These independent contractual claims arising from the City's voluntary decision to adopt its affirmative action plan have nothing to do with the issues in this case and would not affect the district court's finding that the City's plan satisfies the *Weber* standards.

[17] Section 706(g) provides in pertinent part:

> No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section [704(a)] of this title.

42 U.S.C. § 2000e-5(g) (1982).

[18] Respondent Vanguards contends that Section 706(g) is satisfied because all those whom the City has agreed to benefit under its affirmative action plan were "actual victims" of prior discrimination. Brief for Vanguards of Cleveland in Opposition to Cer-

And in either case, the interests of non-minority employees adversely affected by the plan are adequately protected.[19]

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rented that changed circumstances show that the affirmative action plan works an unexpected hardship or has outlived its purpose and seek to modify the decree on those or other grounds. In either case, the district court overseeing the decree has jurisdiction to modify the decree accordingly. United States v. Swift & Co., 286 U.S. 106, 114-15 (1932). *See* Kirkland v. New York State Dep't of Correctional Services, 711 F.2d at 1155-56.

[19] Justice O'Connor has recognized that "if innocent employees are to be required to make any sacrifice in the final consent decree, they must be represented and have had full participation rights in the negotiation process." Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576, 2593 n.3 (1984) (O'Connor, J., concurring). In fact, the interests of non-minority employees were represented by the Union throughout the negotiations and several hearings in this case. Thus, non-minority employees had their "day in court" with a full opportunity to be heard in opposition to the affirmative action plan, and their interests were protected when the district court analyzed the employer's proposed plan under *Weber* and concluded that it does not infringe the legal rights of non-minority employees.

The Department of Justice contends that the non-minority employees who intervened in this case had the power to reject the consent decree because, as intervenors, they are "parties" bound by the judgment of the court. Brief for United States as Amicus Curiae at 25-28. To be sure, a consent decree may not be entered over the objections of a party bound and adversely affected by its terms. *See* United States v. Ward Baking Co., 376 U.S. 327 (1964); Hughes v. United States, 342 U.S. 353 (1952). But the Department misstates the effect of this consent decree. Clearly, the intervenors' "reverse discrimination" claims (*i.e.*, that the City's proposed affirmative action plan violates *Weber*) stand independent of the original plaintiffs' claims of discrimination by the City. Settlement or dismissal of the original claim ordinarily does not affect the right of an intervenor to press its independent claims. *See* United States Steel Corp. v. M.P.S., 611 F.2d 443 (3d Cir. 1979); Pulley v. Volk, 331 F.2d 325 (3d Cir. 1965); *see also* Pasadena City Board of Education v. Spangler, 427 U.S. 424, 430-31 (1976) (United States may remain as intervenor after original claims become moot); Centron v. United States, 585 F.2d 942 (10th Cir. 1978) (only those parties who have assented to consent judgment are bound by its terms). Thus, the consent decree disposing of the original

Department of Justice claims that "Section 706(g) is not concerned with protecting an employer from being 'require[d]' to enter into a consent decree . . . ." Brief for the United States as Amicus Curiae at 20. Instead, according to the Department, Section 706(g) "prohibits the entry of a court order that requires the implementation of quotas." *Id.* These claims disregard the words and purpose of the statute.

First, and central to this case, the City of Cleveland *has agreed* to adopt this affirmative action plan. Section 706(g) limits the power of courts to "*require* . . . the hiring, reinstatement, or promotion of an individual" who suffered an adverse employment decision for reasons other than illegal discrimination. 42 U.S.C. § 2000e-5(g) (1982) (emphasis added). Just as this Court in *Weber* read Congress' use of the word "require" in Section 703(j) of Title VII to permit employers to adopt voluntary affirmative action plans, 433 U.S. at 205-06, so Section 706(g) must be understood only as a limit on the *coercive* power of courts, not as a limit on the *freedom* of employers to take voluntary steps to remedy past discrimination. And just as Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) (1982), protects the freedom of employers to adopt bona fide seniority systems and other methods of making employment decisions, so Section 706(g) protects from judicial interference the freedom of employers to make such other lawful employment decisions as they choose. The consent decree in this case implements the city's lawful, voluntary agreement to adopt an affirmative action plan. Section 706(g), designed as a shield for employers, not as a a sword for employees, protects the employer's freedom to choose that course.

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tiaveri at 19-20. Petitioner and amici dispute this understanding of the plan's application. Brief for Petitioner at 19-20; Brief for the United States as Amicus Curiae at 3 n.1. This Court need not resolve the matter, for the City voluntarily adopted the plan and Section 706(g) is therefore irrelevant.

Second, the Department of Justice seeks support for its misreading of Section 706(g) by misstating this Court's holding in *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984).[16] In *Stotts*, this Court overturned a district court order that imposed on the City of Memphis, *over its vehement objection*, an affirmative action lay-off plan to which the City had not agreed and which interfered with the City's established seniority system. *Id.* at 2590. That is not this case, and whatever the precise scope of Section 706(g) under *Stotts*, it does not prohibit a court from confirming an employer's voluntary affirmative action plan, as this Court did in *Weber*.[17]

Third, the Department of Justice insists that the consent decree is invalid because it fails to conform with Title VII's "'statutory objectives.'" Brief for the United States as Amicus Curiae at 21 (quoting *System Federation No. 91 v. Wright*, 364 U.S. 642, 651 (1961)).[18] As we have shown, however, that is not so. Title VII encourages voluntary remedial measures, and the voluntary measures embodied in Cleveland's consent decree are fully consistent with that statutory policy. The Department's

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[16] *See also* Paradise v. Prescott, 767 F.2d 1514, 1527-30 (11th Cir. 1985); Turner v. Orr, 759 F.2d 817, 823-26 (11th Cir. 1985), *petition for cert. filed*, 53 U.S.L.W. 3888 (July 31, 1985); Hammon v. Barry, 606 F. Supp. 1082 (D.D.C. 1985).

[17] *See, e.g.*, Paradise v. Prescott, 767 F.2d at 1529; Turner v. Orr, 759 F.2d 824-25; Van Aken v. Young, 750 F.2d 43, 44-45 (6th Cir. 1984); Wygant v. Jackson Board of Education, 746 F.2d 1152, 1157-58 (6th Cir. 1984), *cert. granted*, 105 S. Ct. 2285 (1985).

[18] In *System Federation*, employees sued their employer under a statutory provision prohibiting discrimination against non-union employees; the employer agreed to a consent decree forbidding such discrimination. 364 U.S. at 643-44. The statute was later amended to allow "discrimination" in the form of a union shop, and the union moved to modify the consent decree. *See id.* at 644-45. This Court held that the modification was required to avoid rendering "protection in no way authorized" by the statute. *Id.* at 648.

interpretation of Section 706(g) would plainly frustrate that policy. If the language of Section 706(g) were read to prohibit *any* "order" contemplating affirmative action, regardless of the employer's consent, the provision would create a strong incentive for those employers who resist remedial measures to take no action, await suit under Title VII, and enjoy the protection of Section 706(g) in settlement negotiations thereafter. Obviously, Congress did not intend such a perverse result.

Nevertheless, the Department appears to have precisely this result in mind, for its claims that under its interpretation of Section 706(g), employers may afford voluntary relief only to "actual victims" of discrimination. Brief for the United States as Amicus Curiae at 29-31. But Congress presented employers with the threat of court-ordered remedies under Title VII in order to *encourage* them to take voluntary remedial steps, including adopting plans of affirmative action. The statute's provision governing the scope of those remedies should therefore be read according to its clear language to continue the same incentive for voluntary action after a complaint is filed as is posed by the threat of litigation itself.

Equally important, the Department's interpretation of Section 706(g) would also undermine Title VII's policy promoting voluntary remedial measures by effectively rendering *voluntary* action of employers *involuntary as a matter of law*. In its unanimous decision in *Carson* v. *American Brands, Inc.*, 450 U.S. 79 (1981), this Court emphasized the right of Title VII litigants to "compromise their dispute on mutually agreeable terms" through the entry of a consent decree. *Id.* at 88. *See also United States* v. *City of Alexandria*, 614 F.2d 1358 (5th Cir. 1980) (reversing district court that refused to approve consent decrees). As the Court in *Carson* recognized, in view of Title VII's policy in favor of voluntary settlement of employment discrimination claims, the use of a consent decree as a vehicle of settlement should be respected as

the employer's voluntary act. *See* 450 U.S. at 88 & n.14 (citing *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974)).

If the Department's contrary reading of Section 706(g) were accepted, an affirmative action consent decree would be invalid even if it were proposed on the strength of the agreement not only of the employer, but of *every non-minority employee* affected by its terms. Congress did not intend such a result. Rather, the distinction Congress intended to be drawn under Section 706(g) is between those affirmative action plans adopted by an employer voluntarily and those "required" of an employer, over its objection, by order of a court. The present case lies on the "voluntary" side of the line Congress has drawn.

The City of Cleveland adopted its affirmative action plan voluntarily, and the consent decree embodying that plan is well within the policies and intent of Congress expressed in Title VII. It should be approved by this Court.

CONCLUSION

For the reasons set forth above, the judgment of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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January 21, 1986

AMICUS CURIAE

BRIEF

Nos. 84-1656 and 84-1999

Supreme Court, U.S.
FILED
JAN 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, *et al.*,

Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*,

Respondents.

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, C.L.C.,

Petitioner,

v.

CITY OF CLEVELAND, *et al.*,

Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Second and Sixth Circuits

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BRIEF OF CITY OF DETROIT, THE DISTRICT OF COLUMBIA AND THE CITY OF LOS ANGELES AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF OF CITY OF DETROIT, THE DISTRICT OF COLUMBIA AND THE CITY OF LOS ANGELES AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

CONSENT OF THE PARTIES

Petitioners and respondents consented to the filing of this Brief. Their letters of consent have been filed with the Clerk of the Court.

INTEREST OF AMICI

The City of Detroit has suffered adverse consequences because of prior discriminatory practices of its public safety agencies, particularly its Department of Police, and a failure to correct the effects of that discrimination. For the past eleven years Detroit has implemented affirmative action plans which have gone far to eradicate the effects of past discrimination against minorities and to cure the crippling effects of that discrimination upon its public safety agencies.[1]

---

[1] Detroit's race-conscious program governing promotions in its Police Department has thus far withstood two separate challenges brought on behalf of white police officers under the Equal Protection Clause and federal civil rights laws. *Detroit Police Officers Association v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981), *on remand*, 26 FEP Cases 1049 (E.D. Mich. 1984), *appeal pending* (6th Cir. No. 85-1120) (sustaining race-conscious promotions to the rank of sergeant); *Baker v. City of Detroit*, 483 F.Supp. 930 (E.D. Mich. 1979), *aff'd sub nom. Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *modified*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984) (sustaining race-conscious promotions to the rank of lieutenant).

Also, the City of Detroit has used race-conscious measures in hiring to the position of firefighter which "for many decades remained, for all practical purposes, the *exclusive domain of white males*." *Van Aken v. Young*, 541 F.Supp. 448, 457 (E.D. Mich. 1982) (emphasis added). The district court's decision upholding those measures has been affirmed. *Van Aken v. Young*, 750 F.2d 43 (6th Cir. 1984).

The district court in *Baker v. City of Detroit*, 483 F.Supp. 930 (E.D. Mich. 1979), found, after a lengthy trial, that Detroit's steps to increase black representation at all levels of the Police Department had played a vital role in reducing citizen distrust of the police, developing community cooperation with the Department, improving the Department's ability to function, and reducing crime. *Baker*, *supra*, 483 F.Supp. at 997-1000. Detroit has pursued these programs unilaterally and voluntarily. However, for Detroit and many other public employers, the authority of the judiciary to decree race-conscious measures in the event unlawful discrimination were established through litigation has provided a vital catalyst for voluntary remedial action.

The District of Columbia has similarly suffered the consequences of prior discriminatory practices by its public safety agencies. Presently pending is a challenge to voluntary race-conscious measures governing hiring in its Fire Department which were sustained by the district court as appropriately "designed to break down an old pattern of racial segregation and hierarchy." *Hammon v. Barry*, 606 F.Supp. 1082, 1090 (D.D.C. 1985), *appeals pending*, Nos. 85-5669 5670 5671 (D.C. Cir.).

The City of Los Angeles has addressed from a different perspective the historical underrepresentation of racial minorities and women in its public safety agencies. Without admitting any liability, the City of Los Angeles joined the United States Justice Department and a certified class of women police applicants in recommending entry of three consent decrees establishing goals and timetables for the hiring of racial minorities in the Los Angeles City Fire Department (1974) and for the hiring of racial minorities and women in the Los Angeles Police Department (1980).

Faced with strong statistical showings of underrepresentation in both departments, and a Court of Appeals ruling that police height and physical ability requirements produced disparate impact against women appli-

cants without business necessity, *Blake v. City of Los Angeles*, 595 F.2d 1367, 1375-76 (9th Cir. 1979), *cert. denied*, 446 U.S. 928 (1980), the City elected to resolve this complex litigation. The Los Angeles consent decrees were based largely upon the affirmative action goals and timetables contained within them. If hiring based upon these goals and timetables cannot lawfully occur, costly litigation will reopen, a decade of growth in racial understanding in the two departments will be threatened, and the establishment of sworn services representative of the communities they serve will be delayed.

SUMMARY OF ARGUMENT

Numerous studies by prestigious, national commissions have recognized the crippling effects of unlawful discrimination upon state and local governments, particularly on the operations of police and other public safety agencies. In extending Title VII in 1972 to cover state and local governments, Congress took note of the findings of such studies. Congress aimed to free governmental functions of the crippling effects of discrimination in such vital areas as public safety, education, and the administration of justice.

The Petitioners and their *amici* including the United States contend that the courts are, *regardless* of the inefficacy of other measures, without authority to impose affirmative, race-conscious measures whenever such measures may incidentally involve the hiring or promotion, etc., of persons other than identified discrimination victims. Acceptance of this *per se* challenge would not only strip the federal courts of an essential tool for overcoming patterns of racial exclusion but would also remove a vital catalyst for voluntary action.

Neither Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, nor the Fourteenth Amendment of the United States Constitution requires such a result.

ARGUMENT

I. EXPERIENCE SHOWS THAT MINORITY PARTICIPATION AT ALL LEVELS IS VITAL TO EFFECTIVE PERFORMANCE BY PUBLIC SAFETY AGENCIES.

A *per se* rule that Title VII prohibits the decreeing of race-conscious remedial measures, insofar as such measures incidentally benefit persons not directly victimized by the employer's unlawful conduct,[1] would stifle efforts to end the mistrust and antagonisms that have developed in our cities between law enforcement agencies and minority citizens. Mutual alienation, with crippling effects on law enforcement and other vital public functions, has resulted in substantial part from long-standing policies and practices of exclusion of minorities from employment in law enforcement agencies. The experience of the City of Detroit is particularly instructive in this regard.

Detroit has suffered, and federal court records document, *see Baker*, 483 F.Supp. at 996-97, racially-based police-community tensions caused in substantial part by years of neglect in the recruitment, hiring and advancement of black public safety officers. Major riots in 1943

[1] The United States has, until recently, consistently taken the position that affirmative remedies are appropriate under Title VII and the Constitution. The Attorney General and the EEOC have, in carrying out their responsibilities to enforce Title VII, obtained affirmative remedies in numerous cases in which they served as plaintiffs. *See, e.g., United States v. City of Alexandria*, 614 F.2d 1358 (5th Cir. 1980); *E.E.O.C. v. Couture Chair Lounge Co.*, 596 F.2d 869 (8th Cir. 1979); *E.E.O.C. v. American Tel. & Tel. Co.*, 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); *United States v. City of Chicago*, 549 F.2d 415 (7th Cir. 1977), *cert. denied*, 434 U.S. 875 (1977); *Rios v. Enterprise Ass'n Steamfitter Local 638*, 501 F.2d 622 (2d Cir. 1974) (action by United States consolidated with that of individual claimants); *United States v. Memphis Contractors Ass'n*, 497 F.2d 871 (6th Cir. 1973); *United States v. Local Union No. 212, I.B.E.W.*, 472 F.2d 634 (6th Cir. 1973); *United States v. Wood, Wire & Metal Lathers Int'l Union, Local Union No. 46*, 471 F.2d 408 (2d Cir. 1973), *cert. denied*, 412 U.S. 939 (1973); *United States v. Ironworkers Local 86*, 443 F.2d 544, 548 (9th Cir. 1971), *cert. denied*, 404 U.S. 984 (1971).

and 1967, as well as several other less noted civil disturbances before and after 1967, were just some of the many manifestations of the breakdown of police-community relations. Prior to 1974, six to eight Detroit police officers were killed in the line of duty each year. Moreover, the widespread belief in Detroit's black community that the police lacked interest in investigating black-on-black crime resulted in a loss of essential citizen cooperation in the police department's crime fighting efforts. *Id.* As described by the District Court in *Baker*:

> "[T]he Police Department was regarded as an 'occupation army' in the black community and was treated as such . . . . Officers were afraid to venture into the [black] community for fear of being harassed or worse.
>
> . . . .
>
> The primary cause was discriminatory practices. Racial criteria entered into the everyday judgments of police officers regarding who they stopped, searched or detained and how they did it. Racial slurs were common. Police brutality against black citizens was less common but still severe.
>
> . . . .
>
> Chief Hart testified that '[i]t's a matter of public record that members of the black community have been beaten up by police unjustifiably and without cause; it's a matter of record.'
>
> . . . .
>
> The black community's response to Department practices was deep hatred and alienation. Not only did the community hate the police, it had no confidence in the police's interest in investigating or solving black on black crime. This lack of confidence was justifiable. The result was that the police got no cooperation from the black community in solving crime.
>
> This is significant because citizen cooperation is essential to solve crime. Lack of support in the black community was devastating to the Department's efforts to police the City. This was the view of Police

> Chief Hart, and former Chiefs Tannian and Murphy. So substantial was the community's alienation that at times there was active interference with officers performing their duty.
>
> • • • •
>
> The police themselves—and ultimately the citizens of Detroit—were the real victims of discriminatory practices."

Id.

The riots in 1967 jolted the City of Detroit into a realization that something would have to be done to correct these imbalances. *See id.* at 946. Between 1967 and 1973 some efforts were not successful. *Id.* at 947-52. In the interim the City's public safety agencies continued to be hampered by effects of their discriminatory legacy. *Id.* at 996-99.

Finally, in 1974, the City adopted a race-conscious, affirmative action plan of hiring and promotion. *Id.* at 963-64. These efforts have resulted in dramatic improvements in the ability of the Detroit Police Department to deliver effective police service. Perhaps the most stark evidence of the effectiveness of Detroit's affirmative action plan was the reduction in the number of officers killed in the line of duty. Prior to 1974, six to eight police officers were killed each year; from 1974 until 1982, no officers lost their lives in the line of duty.[3] *See id.* at 1000. In *Baker*, the district court detailed this and other improvements and concluded:

> "There is clear evidence in the record that before 1974 there existed enormous tension between the Department and the black community. There is clear evidence in the record that after the institution of the affirmative action program, police-community relations improved substantially, crime went down, complaints against the Department went down, and no police officers were killed in the line of duty.

[3] Although Detroit has since suffered the death of smaller numbers of police officers, the police department's relationship with the black community continues to improve.

> High ranking police officials attributed this change to the affirmative action program and its general aim of having the Department—at all levels—reflect the City's population."

Id.

Detroit's experience specifically indicates that visible representation of minorities at all levels of the police department, not merely at the patrol level, is of critical importance in breaking the pattern of hostility and alienation that results from prior exclusion of minorities. As stated by the district court:

> "The testimony at trial demonstrates that it is important to have blacks at all levels. The importance of black lieutenants in reducing discriminatory practices cannot be overstated. It is very difficult to mistreat blacks if one knows that the commanding officer is black. Inspector Douglas emphasized that the presence of a black lieutenant at police raids ensured that blacks on the scene would not be abused.
>
> • • • •
>
> Similarly, a black lieutenant affects the perceptions of the black community. He is a commanding officer whose very presence confirms that blacks are no longer the second-class policemen which they used to be. Chief Hart put it this way:
>
> 'When [citizens] arrive at the precinct stations, they see some black lieutenants sitting behind the desk making decisions on their lives and they feel better about that. They will cooperate with us. They don't feel that we are an army of occupation.'

Id. at 998-99. In the experience of Detroit, the ability to make race-conscious employment decisions has been the critical ingredient in efforts to restore community trust in Detroit's law enforcement agencies and to facilitate Detroit's ability to protect the lives and property of its people. *See id.* at 999.

Overwhelming evidence of the experience in many other cities demonstrates that the crisis experienced by Detroit is only one example of a nationwide problem. The Sixth Circuit has collected and summarized the many studies that make the importance of having racially representative police forces in our cities judicially noticeable. The operational need to have a minority presence in public safety agencies that is representative of the minority population of the community served

> "is based on law enforcement experience and a number of studies conducted at the highest levels. *E.g.*, National Advisory Commission on Criminal Justice Standards and Goals, *Police* (1973); National Commission on the Causes and Prevention of Violence, *Final Report : To Establish Justice, To Insure Domestic Tranquility* (1969); Report of the National Advisory Commission on Civil Disorders (1968); President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Police* (1967). As these reports emphasize, the relationship between government and citizens is seldom more visible, personal and important than in police-citizen contact. *See To Establish Justice*, *supra* at 145; *Report on Civil Disorders*, *supra* at 300 (New York Times edition). It is critical to effective law enforcement that police receive public cooperation and support. *Report on Civil Disorders*, *supra* at 301; *Task Force Report: The Police*, *supra* at 144-45, 167; *Police*, *supra* at 330.

These national commissions recommended the recruitment of additional numbers of minority police officers as a means of improving community support and law enforcement effectiveness. . . .

In 1967, a presidential commission stated the proposition offered by the defendants in this case:

> In order to gain the general confidence and acceptance of a community, personnel within a police department should be representative of the community as a whole.

Task Force Report: The Police, *supra* at 167." *Detroit Police Officers Ass'n v. Young*, 608 F.2d at 695.[4]

More recently completed studies have reached the same conclusion. In a report published in October 1981, the United States Commission on Civil Rights found: "Serious underutilization of minorities and women in local law enforcement agencies continues to hamper the ability of police departments to function effectively in and earn the respect of predominantly minority neighborhoods, thereby increasing the probability of tension and violence." U.S. Commission on Civil Rights, *Who Is Guarding the Guardians: A Report on Police Practices*, 5 (1981). Following an investigation into the May 1980 racial disturbance in Miami, Florida, the U.S. Civil Rights Commission observed: "In Dade County, an essentially white system administers justice to a defendant and victim population that is largely black. The lack of minorities throughout the criminal justice system maintains the perception of a dual system of justice." U.S. Commission on Civil Rights, *Confronting Racial Isolation In Miami*, 290 (1982).

These studies confirm Detroit's experience that minority representation at the higher levels of law enforcement also is crucial. A 1967 Report of the President's Commission on Law Enforcement and Administration of Justice, entitled *Task Force Report: The Police*, concluded that: "[i]f minority groups are to feel that they are not policed entirely by a white police force, they must see that Negro or other minority officers participate in policymaking and other crucial decisions." *Id.* at 172. Relying on this and other studies, the Sixth Circuit concluded that the need for a police department representative of the community as a whole "extends to the higher ranks in police depart-

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[4] Other courts of appeals have agreed with the Sixth Circuit concerning the operational need for a racially representative police force. *See Talbert v. City of Richmond*, 648 F.2d 925, 931 (4th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982); *Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Service Comm'n*, 482 F.2d 1333, 1341 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975).

ments." *Detroit Police Officers Ass'n v. Young*, 608 F.2d at 693.

The federal government also has recognized the public safety crisis created by discrimination against minorities by state and local law enforcement agencies and has called for affirmative action to remedy this problem. The Law Enforcement Assistance Administration ("LEAA")[1] has concluded "that the full and equal participation of women and minority individuals in employment opportunities in the criminal justice system is a necessary component to the Safe Streets Act's program to reduce crime and delinquency in the United States." 28 C.F.R. § 42.201 (1985). LEAA regulations require that where a "recipient has previously discriminated against persons on the ground of race . . . [or] color . . . , the recipient must take affirmative action to overcome the effects of prior discrimination." 28 C.F.R. § 42.203(i)(1) (1985).[2]

This Court in *United Steelworkers v. Weber*, 443 U.S. 193 (1979), upheld the voluntary use of affirmative, race-conscious measures under Title VII as an appropriate

[1] The LEAA is the arm of the Department of Justice which administers federal financial assistance to state and local law enforcement agencies and which enforces the anti-discrimination provisions of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 42 U.S.C. § 3789d.

[2] The regulations also provide that, "[e]ven in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race . . . [or] color . . . ." 28 C.F.R. § 42.203(i)(2) (1985). Although there are statutory provisions stating that the LEAA may not require a recipient to adopt "a percentage ratio, quota system, or other program to achieve racial balance," 42 U.S.C. § 3789d(b), the regulations promulgated thereunder recognize that "[t]he use of goals and timetables is not use of a quota prohibited by this section." 28 C.F.R. § 42.203(j) (1985). Notably, the statute in its original form prohibited remedies intended "to achieve racial balance or to eliminate racial imbalance." 42 U.S.C. § 3766 (1976) (emphasis added). This last restriction was deleted by Section 811(b)(1) of the Justice System Improvement Act of 1979, Pub. L. No. 96-157, 93 Stat. 1167, 1206 (1979).

means of removing racial barriers and opening employment opportunity. Acceptance of Petitioners' *per se* challenge to the decreeing of such measures would not only strip the courts of an essential remedial tool but would eliminate a vital catalyst to the voluntary affirmative action held salutary in *Weber*. Such a result would go far to defeat the purpose of Congress in 1972 of extending Title VII to state and local governments.

II. THE DESIRE TO CORRECT THE CRIPPLING EFFECTS OF DISCRIMINATION ON PERFORMANCE OF PUBLIC SAFETY FUNCTIONS WAS A LEADING CONCERN OF CONGRESS IN EXTENDING TITLE VII COVERAGE TO STATE AND LOCAL GOVERNMENTS.

In extending Title VII to cover state and local governments, Congress recognized that governmental ability to carry out vital functions in the areas of public safety, education and administration of justice was crippled in many instances by a legacy of discrimination. Congress contemplated that remedies would be devised which would effectively overcome patterns of racial exclusion and thereby remove impediments to government's ability to function. Affirmative remedies mirror Congress' objective.

Subsequent to the enactment of Title VII in 1964, widespread community unrest including riots in numerous cities and other localities provoked a heightened concern regarding the state of race relations in this country. As set forth above, a succession of national commissions drew attention to the low representation of minority groups in policing and other public safety functions as a cause of the disorders.

Congress in 1972 subscribed explicitly to the concerns expressed in these reports. In extending Title VII coverage to state and local governments, Congress looked for guidance specifically to two such reports by the U.S. Commission on Civil Rights: (1) *For All the People . . . By All the People—A Report on Equal Opportunity in State and Local Government Employment* (1969), and (2)

Mexican Americans and the Administration of Justice in the Southwest (1970). These two Commission reports were quoted in both the Senate and House Committee reports; referred to in debate by the sponsor of the legislation; and set forth in full in the Congressional Record.

Congress took notice of the crippling effects of racial exclusions from public employment on the ability to govern. It identified the need to remedy this condition as one of the central purposes of extending Title VII to cover state and local governments. The Report of the Senate Committee on Labor and Public Welfare, citing the reports of the U.S. Commission on Civil Rights, stated:

> "This failure of State and local governmental agencies to accord equal employment opportunities is particularly distressing in light of the importance these agencies play in the daily lives of the average citizen. From local law enforcement to social services, such citizen in a community is in constant contact with many local agencies. . . . Discrimination by government therefore serves a doubly destructive purpose. *The exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in that particular community, but also creates mistrust, alienation, and all too often hostility towards the entire process of government.*" S.Rep. No. 92-415, 92d Cong., 1st Sess. 10 (1971), *reprinted in 1972 Leg. Hist.* at 419 (emphasis added).[1]

The Report of the House of Representatives Committee, also citing the Civil Rights Commission reports, was to the same effect:

> "The problem of employment discrimination is particularly acute *and has the most deleterious effect in those governmental activities which are most visible to the minority communities* (notably education, law enforcement, and the administration of justice) *with the result that the credibility of the government's claim to represent all the people is negated.*" H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 17 (1971), *1972 Leg. Hist.* at 77 (emphasis added).

[1] References to *1972 Leg. Hist.* are to *Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 92d Cong., 2d Sess., *Legislative History of the Equal Employment Opportunity Act of 1972* (Comm. Print 1972).

Senator Harrison Williams, chairman of the Labor and Public Welfare Committee and sponsor of S.2515, emphasized strongly the Congressional concern for the ability of units of state and local government to carry out their assigned responsibilities. He stated that the Committee had acted out of a belief that their work was "essential to the viability of State and local governmental units." *1972 Leg. Hist.* at 1116. He stated that the Senate Committee's concern with employment discrimination was based, in large part, upon the unfavorable impact which it had on "the ability of . . . governmental units to deal equitably in their contacts with those groups against whom they discriminate in employment." *Id.* As Senator Williams succinctly phrased the matter, "*If they are to carry out their jobs with any success whatever, public confidence in their impartiality is vital.*" *Id.* (emphasis added).

In the course of Senate debate Senator Williams referred to and placed in the Congressional Record, both Reports of the U.S. Commission on Civil Rights. *1972 Leg. Hist.* at 1117, *et seq.* With respect to race-conscious remedies, the 1969 Report stated:

> ". . . [W]henever in public employment discriminatorily created patterns persist, the Constitution requires that they be remedied *by measures aimed at giving the work force the shape it presently would have were it not for such past discrimination.* It should be recognized that such measures are not a 'preference' but rather a restoration of equality; one can see inequity in such remedies only by being blind to the past injustices which they cure."

1972 Leg. Hist. at 1120 (emphasis added). The Commission's 1969 Report called for state and local governments

to adopt programs which will "bring about whatever changes in minority utilization are necessary to undo the effects of past discrimination." *1972 Leg. Hist.* at 1120. "*Where patterns of minority utilization are to be changed, the program should include specific goals, or estimates, to be achieved within a specified period of time.*" *Id.* (emphasis added).

Congressional solicitude for assuring the ability of local governmental units to carry out their essential functions is in harmony with court decisions such as *Baker* upholding Detroit's use of race-conscious measures in its police department. It matches precisely the experience of *amici* in pursuing race-conscious affirmative measures to increase minority representation in their public safety departments. To date, those measures have gone far toward undoing the pernicious effects of discrimination which influenced Congress to extend Title VII to cover state and local governments. Rather than being prohibited by § 706 (g), the affirmative measures which are at issue mirror Congress' objective.

III. THERE IS NO BARRIER UNDER TITLE VII OR THE CONSTITUTION TO JUDICIAL DECREES OF RACE-CONSCIOUS RELIEF NEEDED TO ERADICATE EMPLOYMENT DISCRIMINATION AND ITS EFFECTS.

A. Lower Court Decisions Upholding Imposition of Race-Conscious Relief are Firmly-Grounded in Remedial Principles Established by this Court.

The two pending cases present this Court for the first time with the permissibility of court-ordered affirmative relief in litigation involving employment discrimination. Appellate decisions since 1969 have unanimously upheld the permissibility of such relief, where called for by the facts of the particular cases, as consistent with Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, as well as 42 U.S.C. §§ 1981 and 1983.[8] Petitioners and *amici*

[8] The decisions are set forth in the brief of Respondents in *Vanguards*.

including the United States present this Court with a *per se* challenge to such relief. They insist it is impermissible regardless of (1) the nature and effects of the discrimination at issue, (2) its persistence in the face of other forms of relief, (3) the public interest in having racial barriers to equal employment at last effectively removed, and (4) the crippling effect of racial exclusion upon law enforcement and other critical governmental functions.

Like the two cases now before the Court, the great majority of the lower court decisions have involved (a) private sector *craft jobs*, and (b) *public safety jobs* such as firefighting, policing, state highway patrol, and corrections. These fields of employment share a striking characteristic: *all involve positions from which black citizens, other minorities, and females traditionally have been largely, and often totally, excluded.*[9] In such cases, where

[9] This Court in *United Steelworkers v. Weber*, *supra*, stated, "Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice." 443 U.S. at 198, n. 1. The Court proceeded to cite several court of appeals decisions upholding race-conscious remedial measures in some instances imposed by court decree and in others undertaken pursuant to statutory or administrative requirements.

As set forth *supra* (Section II), the pervasiveness of racial exclusions in public safety jobs was a key concern of Congress in amending Title VII to cover state and local governments. Lower courts have likewise called attention to entrenched patterns of racial exclusion from public safety employment. For example, the Sixth Circuit, in the course of sustaining Detroit's voluntary use of numerical ratios for promotions to the rank of police sergeant, stated that the persistence of racial barriers in police employment was equally appropriate for judicial notice as the racial exclusion from craft jobs judicially-noticed in *Weber*. *DPOA v. Young*, 608 F.2d 671, 690 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981) (see the several cases cited therein). The degree of racial exclusion in the cases involving fire departments exceeds even that in police departments, *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972) (no blacks among City's 535 firefighters); *Ass'n Against Discrimination v. City of Bridgeport*,

patterns of racial exclusion are especially pronounced and deep-seated, the combination of "make-whole" relief for identified victims and an injunction prohibiting future discrimination, and even ordering steps which are not race-conscious, has frequently failed to bring about increased employment opportunity. In those cases, such race-conscious devices as numerical goals for hiring, promotion, union membership, etc., have proven to be essential tools for overcoming patterns of racial exclusion."[16]

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20 FEP Cases 985, 989 (D. Ct. 1979) (no blacks among City's 428 firefighters); *Arnold v. Ballard*, 6 FEP Cases 287, 288 (N.D. Ohio 1973); *United States v. City of Alexandria*, 614 F.2d 1358, 1363, n. 12 (5th Cir. 1980). The district court in *Vos Alva v. Young*, *supra*, referred to the fire fighter position in Detroit as having been "for many decades . . . the exclusive domain of white males." 541 F.Supp. at 457.

Title VII and affirmative action have opened many opportunities to black workers in craft and public safety employment. *See* Leonard, *The Impact of Affirmative Action on Employment*, 12 Journal of Labor Economics 439 (1984). In 1972 blacks made up 3.2 percent or 15,872 of the 496,009 electricians in the country, whereas in 1979 blacks represented 5.6 percent or 35,480 of the 640,000 electricians in the country. The number of black electricians has more than doubled in these seven years. In general, during the period 1972 through 1979, a period of active Title VII enforcement and affirmative action implementation, the number of blacks working in the craft and kindred census category increased by 270,000. 1980 Statistical Abstract of the United States (1980), at Table 697. In 1970, 6.34 percent or 23,796 of the 375,494 police officers and detectives in the country were black. U.S. Bureau of the Census, Census of the Population: 1970 Vol. 1, Characteristics of the Population, Part 1, United States Summary—Section 1 (1973), at Table 223. In 1982, 9.3 percent or approximately 47,000 of the 505,000 police officers in the country were black. 1984 Statistical Abstract of the United States (1984), at Table 696.

[16] In employment discrimination cases the lower courts have recognized three distinct types of relief. *Berkman v. City of New York*, 705 F.2d 584, 595-596 (2d Cir. 1983). These include (1) "*compliance relief*" which restricts the use of practices determined to be illegal and requires the hiring, promotion, etc., of members of the plaintiff class whom the court has found to be victims of the defendant's discrimination, 705 F.2d at 595; (2) "*compensatory relief*" to "make whole" the victims of the defendant's discrimination as through awards of backpay and constructive seniority, *id.*; and (3) "*affirmative relief*" designed principally to remedy the effects of discrimination that "may not be cured by the granting of compliance or compensatory relief." *Id.* at 596. "Affirmative relief may also include interim hiring relief that is extended to persons other than members of the plaintiff class"—*i.e.*, persons not victims of discrimination—"and in proportions exceeding the ratio of plaintiff class members to the total applicant pool." *Id.*

Under federal civil rights laws and the Constitution, the federal courts have broad powers to remedy prohibited discrimination and its effects. Title VII is no exception. Title VII has, since its enactment, authorized the federal courts to ". . . order such affirmative action as may be appropriate . . ." § 706(g), 42 U.S.C. § 2000e-5(g).[17] As

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[17] While the language of § 706(g) was drawn from § 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c), the argument of the United States based on the NLRA model (United States brief as amicus in *Vongsouvath*, 8, n. 5) has multiple flaws. *First*, the United States overlooks this Court's caveat that NLRA principles "generally guide, *but do not bind*, courts in tailoring remedies under Title VII". *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228, n. 8 (1982) (emphasis added). *Second*, the labor cases, while stressing the necessity to make whole victims of unfair labor practices, do not address either the circumstances which might call for affirmative relief which extends to nonvictims or the permissibility of such relief. *Third*, while the labor cases provide a useful guide for the shaping of "make whole" relief under Title VII, they offer little guidance as to the nature of appropriate affirmative action to remedy racial barriers to equal employment. As to the latter, the lower courts have correctly looked to remedial principles established by this Court in other civil rights areas such as school desegregation and voting rights. *Fourth*, to the extent the labor cases are at all pertinent, they support permissibility of race-conscious affirmative relief. The labor cases refer to the NLRB's duty to ". . . *restor[e] the . . . status quo that would have obtained but for the company's wrongful [act]*." *NLRB v. Rutter-Rex Mfg. Co., Inc.*, 396 U.S. 258, 263 (1969), and "to take *measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice*." *Carpenters v. NLRB*, 365 U.S. 651, 657 (1961) (Harlan, J., concurring), quoted in *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 769 (1976) (emphasis added).

"Recreat[ing] the conditions" that would have come to exist but for illegal discrimination, is the essence of race-conscious affirmative

described by Chief Justice Burger, Title VII's primary objective "was to achieve equality of employment opportunities and *remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.*" *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430 (1971) (emphasis added). In delineating the federal courts' broad remedial mission in Title VII cases, the Court stressed "*the* statutory objectives" including not only "making persons whole for injuries suffered through past discrimination" but also "*eradicating discrimination throughout the economy. . . .*" *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975) (emphasis added).

The lower court decisions, unanimously upholding permissibility of race-conscious, affirmative relief, are firmly-grounded in decisions of this Court. In other civil rights contexts, this Court has declared that federal courts are *not only authorized but obliged to formulate decrees which will succeed in eradicating discrimination and its effects.* Almost contemporaneous with the effectuation of Title VII in 1965, this Court declared—in the context of a historically entrenched racial denial of black citizens' constitutional right to vote—what has since become the key tenet of remedy formulation in civil rights cases, including those under Title VII:

> "[T]he court has *not merely the power but the duty to render a decree which will so far as possible elimi-*

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relief. As stated in *Rios v. Enterprise Ass'n Steamfitters*, supra, 501 F.2d at 631:

> "Where a racial imbalance . . . is directly caused by past discriminatory practices *it is readily apparent that if the rights of minority members had not been violated, many more of them would enjoy those rights than presently do so and that the ratio of minority members enjoying such rights would be higher. . . .* The effects of such past violation of the minority's rights cannot be eliminated merely by prohibiting future discrimination, since this would be illusory and inadequate as a remedy. Affirmative action is essential." (emphasis added).

> *nate the discriminatory effects of the past as well as bar like discrimination in the future.*"

Louisiana v. United States, 380 U.S. 145, 154 (1965) (emphasis added).

In school desegregation decisions spanning the past 20 years, this Court has emphasized the federal courts' authority and duty to root out discrimination and its effects. In *Green v. County School Bd.*, 391 U.S. 430, 437-38 (1968), this Court declared that a school board operating a dual system is

> "clearly charged with the affirmative duty to take *whatever steps might be necessary* to convert to a unitary system in which racial discrimination would be eliminated root and branch." (emphasis added).

This Court emphasized that the "burden on a school board . . . is to come forward with a plan that promises realistically to work, and promises realistically to work *now.*" *Id.* at 439 (emphasis in original). The race-neutral, freedom-of-choice plan before the Court in *Green* held no promise for eliminating racial imbalance and was accordingly disapproved. This Court held in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), that the broad equity powers which arise when a school board fails to carry out its obligation include an array of race-conscious devices to reduce racial imbalance: numerical ratios for student and teacher assignments; redrawing of school boundary lines; pairing of noncontiguous districts, and the decreeing of student transportation. In the words of Chief Justice Burger, in effecting a remedy for a civil rights violation, "[r]ace must be considered. . . ." *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 46 (1971).

Petitioners and the United States overlook that the myriad of lower court decisions upholding imposition of race-conscious affirmative relief are firmly-grounded in the remedial principles declared in these decisions. In upholding use of race-conscious affirmative remedies in employment cases, lower courts have time and again

looked to the quoted language from *Louisiana v. United States* as well as the marching orders issued in *Green* and *Swann*.

This Court in turn itself endorsed those lower court decisions in the course of opinions in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) and *Fullilove v. Klutznick*, 448 U.S. 448 (1980). Four members of this Court in *Bakke* stated that Congress in 1972 "explicitly considered and rejected proposals to alter . . . the prevailing judicial interpretations of Title VII as permitting, and in some circumstances requiring, race-conscious action." *Regents of the University of California v. Bakke*, *supra*, 438 U.S. at 353, n.28 (1978) (Opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part). Chief Justice Burger in *Fullilove* declared that the remedial powers of the federal courts include race-conscious remedies and the "the authority of a court to incorporate racial criteria into a remedial decree also extends to statutory violations." *Fullilove*, *supra*, at 482-483 (Opinion of Burger, C.J., White, J., and Powell, J. announcing judgment). Justice Powell predicated approval of the set-aside provision in *Fullilove* on criteria utilized by the courts of appeals in what he termed the "closely analogous area" of "race-conscious hiring remedies." *Id.* at 510. (Powell, J., concurring) He referred approvingly to the lower courts' practice of imposing "temporary hiring remedies insuring that the percentage of minority group workers in a business or governmental agency will be reasonably related to the percentage of minority group members in the relevant population." *Id.* at 513.

B. Race-Conscious Relief Has Often Proved Essential to the Elimination of Racial Barriers Which Cripple Law Enforcement and Other Public Functions.

In many employment cases, the lower courts have found racial exclusions and barriers every bit as pervasive and intractable as those posed by the disenfranchisement of black citizens at issue in *Louisiana v. United States* and the unconstitutional segregation of black school children

which persisted after *Brown I* and *Brown II*. For example, in *NAACP v. Allen*, 493 F.2d 614 (5th Cir. 1974), the Fifth Circuit upheld imposition of race-conscious hiring relief, including a numerical ratio and goal, in the case of the Alabama Highway Patrol, long the most visible instrument of white supremacy in the State of Alabama.[11] As reasons for upholding the appropriateness of affirmative hiring relief in the particular case before it, the Fifth Circuit noted the Alabama Highway Patrol's long history of intentional discrimination, its failure to take positive corrective steps on its own initiative, and its 37-year old reputation as an all-white organization. *See* 493 F.2d at 620-21. Indeed, an injunction prohibiting continued racial discrimination which had been issued 18 months previously in related litigation had failed to result in the hiring of a single black employee. *Id.* at 621. In such circumstances, the Fifth Circuit's approval of a race-conscious hiring remedy constituted virtually an inevitable application of the remedial principles this Court established in other fields of civil rights litigation.

The inefficacy of race-neutral relief in opening employment opportunities for blacks in public employment in Alabama has been recently detailed by Douglas B. Huron. Huron & Pendleton, *Equality of Opportunity, or Equality of Results?*, 13 Human Rights 18 (Fall 1985).[12] As re-

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[11] The decision was explicitly grounded upon this Court's three decisions in *Louisiana v. United States*, *Swann*, and *Green*. *See* 493 F.2d at 617, 619. The Fifth Circuit observed that use of "mathematical ratios" is a "useful starting point in shaping a remedy to correct past unconstitutional violations" in cases of employment discrimination litigation just as in desegregation of schools. *Id.* at 619-20 (quoting *Swann*, 402 U.S. at 25).

[12] Separate articles by Mr. Huron, a former senior trial attorney in the Justice Department Civil Rights Division and associate White House counsel, and Clarence M. Pendleton, Chairman of the U.S. Commission on Civil Rights, were juxtaposed under this title in the form of a debate on race-conscious affirmative action.

counted by Mr. Huron, the district court's order quickly brought about the hiring of Alabama's first black troopers. *Id.* at 22. Within two years, there were a substantial number of blacks on the force and the director of Public Safety data testified they were competent professionals. *Id.* Today, according to Mr. Huron, Alabama has one of the most integrated state justice forces in the country; over 20% of the troopers and 25% of support personnel are black. *Id.* The implications for black employment opportunity in other Alabama state agencies have proven immense:

> "When Justice contrasted the initial results on the trooper force with the lack of progress in other Alabama agencies, the department went back into court, asking that hiring ratios be applied to entry-level jobs in the other Alabama agencies. Judge Johnson gave the agencies plenty of time—over two years—to mend their ways.
>
> When little changed, he issued a decision finding statewide discrimination, but he demurred to Justice's plea for quotas. He said that 'mandatory hiring quotas must be a last resort,' and he declined to order them. But he noted that the denial would be 'without prejudice' to Justice's seeking the same relief one year later: 'In the event substantial progress has not been made by the 70 state agencies, hiring goals will then be the only alternative.'
>
> *The message—the threat—could not have been clearer, and the agencies immediately began to roar around. In the eight largest departments, which together account for close to 75 percent of all state workers, black employment increased by over half between 1975 and 1983 and now stands at over 20 percent. And black workers, who used to be concentrated in menial jobs, now appear in substantial numbers in nearly all the larger job categories.*

No doubt problems remain in Alabama, but the only fair conclusion is that dramatic progress has been achieved in public employment for blacks over the past decade. And *in view of the history of the Alabama litigation, it is clear that this would not have occurred if Judge Johnson had not first imposed a hiring quota on the state troopers—and then threatened to extend it statewide if the other agencies did not alter their discriminatory practices.*" *Id.* (emphasis added).

Notably, Chairman Pendleton, who took the opposing view in the article, offered no suggestion as to how employment opportunities would have been opened to blacks in such agencies as the Alabama Highway Patrol without the use of race-conscious measures. Nor do the Petitioners and their *amici* in these cases.[14]

C. The 1972 Amendments to Title VII Accentuate the Authority of Federal Courts to Decree Race-Conscious Affirmative Relief in Appropriate Cases.

As amended in 1972, the first sentence of § 706(g) now authorizes a court to order "such affirmative action as

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[14] In its strained attempt to square its new reading of § 706(g) with the remedial principles this Court established in other civil rights areas, the United States transparently misinvokes this Court's teaching that the "scope of the remedy" must fit "the nature and extent of the . . . violation." Brief for the United States as Amicus Curiae Supporting Petitioner in No. 84-1999 at 6-7. It is precisely because the lower courts repeatedly found that make-whole relief to discrimination victims failed to match the extent of a defendant's discrimination that they found affirmative, race-conscious relief to be required. The United States seizes from context a single isolated phrase ("[a desegregation remedy] is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Milliken v. Bradley*, 418 U.S. 717, 746 (1974)) as if to suggest that this Court somehow required relief in school desegregation cases to be "victim-specific." The passage, in context, says only that a desegregation remedy could not extend to neighboring jurisdictions not shown responsible for segregation in the school district at issue. The principle that the "scope of the remedy" must fit "the nature and extent of the . . . violation", has never supported the rigid stricture that civil rights remedies must be victim-specific. The very notion that school desegregation would be required only on behalf of "specific victims" and not black students as a group is patently absurd.

States, (United States Br. in *Vanguards*, 12, n. 9), it is obvious that the amendment sought to counter those who favored EEOC enforcement, by an expansion upon the courts' remedial powers.

Ironically, Senator Dominick argued in the course of the debates on his proposed amendments that the federal courts "are free from the subtleties of political winds that occur when an administration changes course or a new administration comes in . . . ." *1972 Leg. Hist.* at 678, 692. Congress' decision to retain court enforcement was thus geared to insulate Title VII enforcement from precisely such shifts in "political winds" as evidenced by the United States' present attacks on judicial decrees whose entry it previously pressed, *see* n. 2, *supra*.

Congress in 1972 also *specifically rejected proposals to bar the ordering of race-conscious relief.* Senator Ervin proposed to prohibit government agencies from requiring employers to adopt goals or quotas for the hiring of minorities. *1972 Leg. Hist.* at 1017. Senator Javits, who led the debate against the Ervin proposal, explained that the amendment would affect not only the activities of federal agencies, but also the scope of judicial remedies available under Title VII. *1972 Leg. Hist.* at 1046, 1048.[17]

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particularly appropriate forum for resolving the same kinds of issues in employment discrimination cases." *Id.* at 1485.

Supporters of these amendments argued to the same effect. Senator Fannin stated that the "court enforcement method would more effectively repair injuries caused by employment discrimination . . . ." and that "the district courts are experienced in handling civil rights matters, having in recent years dealt effectively with a broad spectrum of civil rights cases, including those involving employment discrimination." *Id.* at 688-689. Senator Cooper stated "the Senator from Colorado is correct . . . that the greatest progress in the field of civil rights against discrimination has been through the decisions of the courts." *Id.* at 1533.

[17] Senator Javits referred to court decisions ordering race-conscious relief as well as the decisions upholding race-conscious administrative measures such as the Philadelphia Plan. At his request, *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th

may be appropriate, which may include, *but is not limited to*, reinstatement, or hiring of employees, with or without back pay . . . *or any other equitable relief as the court deems appropriate.*" 42 U.S.C. § 2000e-5(g) (emphasized language added in 1972). The amended language was drawn by the conference committee from the Senate-approved version of the statutory amendment. *1972 Leg. Hist.* at 1816-1817, 1838-1839. The section-by-section analysis stated that the revised § 706(g) was "intended to give the courts wide discretion exercising their equitable powers to fashion *the most complete relief possible.*" *1972 Leg. Hist.* at 1848 (emphasis added).

The new language derived from amendments offered by Senator Dominick and other opponents of a proposal to shift enforcement powers to the EEOC. Senate Bill S.2515, as reported by the Senate Committee, proposed such a shift. *1972 Leg. Hist.* at 382-383. Senator Dominick's amendments retained enforcement authority in the courts but, by way of compromise, expanded upon the breadth of the courts' remedial authority. *1972 Leg. Hist.* at 558, 1348, 1490. The Senate adopted Amendment No. 878 as modified by No. 884. *1972 Leg. Hist.* at 1561. In debate, Senator Dominick praised the courts' performance in remedying civil rights violations and specifically in formulating remedies under Title VII.[16] Contrary to the United

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[16] Explaining the first of his proposed amendments which included the revised language accentuating federal judicial authority, Senator Dominick stated that the amendment "offers a welcome opportunity . . . to strike a small, but perhaps significant blow for the judicial branch of our Government." *1972 Leg. Hist.* at 497. He stated, "Consider for a moment where minorities would be without the monumental court decisions recognizing and protecting their rights in education, in public accommodations, in housing, in voting and in equal employment." *Id.* at 691. Senator Dominick cited a statement of Assistant Attorney General David L. Norman in favor of continued court enforcement; one of the reasons given by the then chief of the Civil Rights Division was "the fact that Federal courts resolve the factual and legal issues in equal opportunity cases in the areas of voting, housing and education" which "make[s] them a

He stated his view that "[w]hat this amendment seeks to do is to undo . . . court decisions" approving use of race-conscious remedies. *Id.* at 1048. The amendment was rejected by a 2 to 1 margin. *Id.* at 1074.

A similar amendment offered by Congressman Dent to the House bill was also not adopted. *1972 Leg. Hist.* at 190, *et seq.* Congressman Dent's amendment was addressd to H.R. 1746 which, as reported out of Committee, proposed to transfer OFCC administration to the EEOC; the amendment proposed that EEOC not be empowered to require federal contractors to adopt goals and timetables as had been done by OFCC in administering E.O. 11246. Ultimately, administration of the Executive Order was left with OFCC and the Dent amendment was not directly addressed. *Id.* at 312-314.

The House debate reflects agreement that—unlike OFCC's authority with respect to the Executive Order—the EEOC had previously had no authority to require employees to adopt goals and timetables as an aspect of *substantive compliance* with Title VII. Contrary to arguments of *amici* (Br. of Local 542, IUOE, at 10-13), the debate does not reflect agreement that federal courts were without authority *to decree race-conscious measures as remedies for established violations.* The House's ultimate action in leaving administration of the Executive Order with OFCC—*with administrative authority intact to require adoption of goals and timetables*—is to the contrary. *A fortiori* the House did not mean to interfere

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Cir. 1971), *cert. denied*, 404 U.S. 984 (1971) was printed in the Congressional Record, along with *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971), *cert. denied*, 404 U.S. 854 (1971). *See 1972 Leg. Hist.* at 1048-1070.

Additionally, Senator Javits referred approvingly to two consent decrees recently entered at the Justice Department's behest which contained race-conscious relief. Senator Javits stated the Ervin amendment "would make it impossible for the Justice Department to obtain such decrees in the future." *1972 Leg. Hist.* at 1071.

with the remedial use of race-conscious measures by the courts."[17]

Since 1972, the lower courts have repeatedly relied on the disposition of the Dent and Ervin amendments in construing Title VII to authorize the imposition of race-conscious relief. *EEOC v. American Tel. & Tel. Co.*, 556 F.2d 167, 177 (3rd Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); *United States v. Elevator Constructors, Local 5*, 538 F.2d 1012, 1019-1020 (3rd Cir. 1977); *Boston Chapter, NAACP v. Beecher*, 504 F.2d 1017, 1028 (1st Cir. 1974); *United States v. IBEW, Local 212*, 472 F.2d 634, 636 (6th Cir. 1973).

While the United States criticizes reliance by the lower courts on the history of these amendments (United States Br. in *Vanguards*, 12-14), this Court has itself found such legislative history to be persuasive specifically with respect to other rejected efforts to modify the relief provision of Title VII. *Albemarle Paper Co. v. Moody*, *supra*, 422 U.S. at 420 & n. 13 (rejection of bills to limit judicial power to award backpay).

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[17] After correctly describing the history of these proposals, Local 542, IUOE misleadingly concludes that participants in the House discussions did not propose to change "the fact that Title VII does not authorize court-ordered racial quotas." (Br. at 13). This supposed "fact" was, as of 1972, contrary to positions taken by *five* courts of appeals, not merely two as asserted by Local 542 (Br. at 13, n. 9). In addition to the Fifth Circuit in *Local 53 of Int'l Ass'n of Heat & Frost I & A Workers v. Vogler*, 407 F.2d 1047 (5th Cir. 1969) and the Ninth Circuit in *Iron Workers Local 86*, *supra*, the Third, Sixth and Eighth Circuits had all declared the federal courts empowered to make remedial use of race-conscious measures: *Contractors Ass'n of Eastern Pa. v. Sec. of Labor*, *supra*, 442 F.2d at 173 n. 47 ("federal courts in overcoming the effects of past discrimination are expressly authorized in Title VII to take affirmative action"); *United States v. IBEW, Local 38*, *supra*, 428 F.2d at 151 (rejecting "pro forma" judgment, remanding for "appropriate affirmative relief", and endorsing use of race-conscious relief in *Vogler* and other decisions); *Carter v. Gallagher*, *supra*, 452 F.2d at 329-336 ("even the anti-preference treatment section of the . . . Civil Rights Act of 1964 does not limit the power of a court to order affirmative relief to correct the effects of past unlawful practices"; endorses *Vogler*, *Ironworkers Local 86*, etc.).

B. This Court's Decision in *Stotts* Does Not Disapprove Imposition of Race-Conscious Affirmative Relief.

Petitioners and the United States contend that *Firefighters Local Union No. 1784 v. Stotts*, —— U.S. ——, 104 S.Ct. 2576 (1984), disapproves lower court decisions sustaining race-conscious relief and limits court-ordered relief under Title VII to identified discrimination victims. This contention has been rejected by each of the courts of appeals which have addressed it to date.[14] The lower courts in *Stotts*, in allowing recently-hired minority employees to displace more senior employees, had effectively awarded such minority employees with "make-whole" relief in the form of competitive seniority. In doing so, the *Stotts* majority said, the lower courts had violated not only § 703(h)'s protection of *bona fide* seniority systems but also the policy of § 706(g) limiting "make-whole" relief to identified discrimination victims. While "make-whole" relief, such as backpay and retroactive seniority, is limited by § 706(g) to discrimination victims, affirmative relief to eradicate the effects of discrimination is not. *Stotts* merely applies the obvious limitation of "make-whole" relief to discrimination victims.

Had this Court in *Stotts* meant to disapprove race-conscious hiring and promotions, it would surely have called for modification of the underlying decrees which included such relief, 104 S.Ct. at 2581, in line with the principles specifically noted in note 9 of the majority opinion. *Id.* at 2587.[15]

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[14] Br. of United States in *Vanguards*, 17.

[15] Subsequent to the *Stotts* decision, the Department of Justice addressed letters to some 50 state and local jurisdictions which are parties to existing court decrees which include race-conscious hiring and/or promotion relief analogous to that involved in the *Memphis* case. The United States has filed motions in some cases asking that the affirmative relief it had previously advocated and successfully obtained be vacated in light of *Stotts*. Just as this Court found no occasion in *Stotts* to call for the vacating of the affirmative hiring relief embodied in the 1974 and 1980 decrees covering the Memphis fire department, the lower courts have thus far rejected the contention that *Stotts* requires the vacating of such relief. *See United States v. City of Buffalo*, 609 F.Supp. 1252 (E.D.N.Y. 1985), *aff'd.* 39 FEP Cases 1168 (2d Cir. 1985); *In re Birmingham Reverse Discrimination Employment Litigation*, No. Cv 84-P-4903F (N.D. Ala.) (Tr. of Proceedings of December 20, 1985, 1342-1360); *United States v. Eichard Albrecht, et al.*, C.A. 80-C-1500 (N.D. Ill.) (Order of August 23, 1985); *United States v. State of New Jersey*, C.A. Nos. 950-73, 77-2054, 79-184 (D. N.J.) (Order of July 26, 1985) (Motion of private reverse discriminatees).

The United States' argument that race-conscious, affirmative relief is precluded by the last sentence of § 706(g) is practically identical to one made against judicial authority to decree race-conscious measures in school desegregation cases which this Court dismissed as meritless in *Swann, supra*, 402 U.S. at 16-17. *Swann* held busing and other race-conscious remedies available despite Title IV of the 1964 Civil Rights Act which specified (1) that "'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance", 42 U.S.C. § 2000c(b), and (2) that the statute did not "empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils . . . to achieve such racial balance." 42 U.S.C. § 2000c-6. With respect to Title IV, which parallels the last sentence of § 706(g), this Court found "no suggestion of an intention to . . . withdraw from courts their historic equitable remedial powers." *Swann, supra*, 402 U.S. at 17. *Swann* exemplifies this "Court's unwillingness to construe remedial statutes designed to eliminate discrimination against racial minorities in a manner which would impede efforts to obtain this objective." *Regents of University of California v. Bakke, supra*, 438 U.S. at 355 (Opinion of Brennan, White, Marshall, Blackmun, *JJ.*).

Tellingly, the United States does not directly argue that race-conscious, affirmative relief was in fact unneeded in the cases where the Justice Department and the EEOC pressed for its entry. Different administrations

may disagree regarding the correct parsing of § 706(g). However, the United States makes no persuasive counter-argument to its long-standing, prior view regarding the vital role of race-conscious measures in the cases of such all-white bastions as the Alabama Highway Patrol.

The foundation for the lower court decisions sustaining race-conscious, affirmative relief remains firm. As long as the federal courts have "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future," *Louisiana v. United States*, *supra*, 380 U.S. at 154, the use of race-conscious numerical ratios and goals must remain an available tool to remove persisting racial barriers to equal employment.

CONCLUSION

This Court should decisively reject the contention that affirmative, race-conscious remedies are prohibited. The decisions in these cases should be affirmed.

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Supreme Court, U.S.
FILED
JAN 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1999

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, C.L.C.
Petitioners,

v.

CITY OF CLEVELAND, *ET AL.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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January 1986

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BRIEF AMICUS CURIAE OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS IN SUPPORT OF RESPONDENT, CITY OF CLEVELAND, ET AL.

INTEREST OF THE AMICUS CURIAE

This brief Amicus Curiae is filed pursuant to Rule 36 of the Rules of this Court on behalf of the more than 1,800 local governments that are members of the National Institute of Municipal Law Officers (NIMLO).

The members of NIMLO are state and political subdivisions. NIMLO is operated by the chief legal officers of its members, variously called city attorney, county attorney, city or county solicitor, corperation counsel, director of law, or any one of some twenty other titles. The Respondent, City of Cleveland, is a member of NIMLO. The ac-

companying brief is signed by the municipal attorneys constituting the governing body of NIMLO, both on behalf of NIMLO and on behalf of each of their own cities.

The attorneys who operate NIMLO for their local governments are responsible for advising their governments on the legal aspects of employee selection and promotion processes such as those at issue in the instant case in accordance with state and federal statutes and the Constitution of the United States as interpreted by this Court. These attorneys also represent their governments in litigation resulting from the municipalities' decisions to follow specific employment practices with regard to certain employees such as those involved in this case.

NIMLO does not agree with the assertion of Petitioner that local governing bodies do not have authority to formulate and implement consent decrees settling employee disputes and establishing specifically tailored policies of equal opportunity appropriate to each municipalities' needs. Here this asserted lack of authority would require the continuation of a dispute where the public interest would best be served by ending that dispute as was done in the consent decree at issue. Adoption of such a position, denying the City of Cleveland the power to enter into such decrees, would impede the ability of local governments to protect the rights and further the opportunities of their residents and employees.

NIMLO believes that the courts below properly concluded that the City of Cleveland was not barred from entering into the consent decree involved herein. Consequently, NIMLO urges affirmance of the judgment entered in this case by the United States Court of Appeals for the Sixth Circuit.

Consent to the filing of this brief has been given by counsel for both parties. Copies of these letters of consent have been lodged with the Clerk of this Court.

STATEMENT OF THE CASE

Amicus adopts the statement of the case and the facts as presented by Respondents, the City of Cleveland, in their brief in opposition to Petition for Certiorari.

SUMMARY OF ARGUMENT

This Amicus Curiae brief is filed by NIMLO in support of the right of governmental entities to enter into consent decrees and agreements in resolution of class action discrimination law suits, which serve to promote equal opportunity for the municipalities' residents and employees. The principles of federalism mandate that local governmental entities have the primary responsibility for formulating and implementing fair and reasonable employment policies and practices which provide equal opportunity for their own residents and employees. Where governmental entities attempt to comply in good faith with state and federal law and constitutional principles as interpreted and applied by this Court, they should be permitted and encouraged to do so without being compelled to engage in extended and costly litigation with the incumbent risk of having their management and operations periodically disrupted by temporary restraining orders and preliminary injunctions.

Municipalities are and should be empowered with the authority to devise and administer their own reasonable employment policies in accordance with the applicable local charters and ordinances, state, and federal law. A

fair and reasonable consent decree should be one of the options available to municipalities challenged by claims of discrimination based upon gross statistical disparity. That is clearly so when, as in this case, such disparity is coupled with the municipality's recognition of and admission that "there has been a long history of discrimination against minority persons in the hiring and promotion practices of the City of Cleveland Division of Fire." It is submitted that such decrees locally agreed upon to fit local conditions by those who are most familiar with those conditions should not be foreclosed unless totally unreasonable or in violation of Constitutional rights. In this case, the Court determined the consent decree to be reasonable and fair after a year of hearings and negotiations in which the interests of all affected employees were heard and considered. Therefore, the Sixth Circuit was correct in upholding the District Courts' adoption of the consent decree adhering to the principles at issue and should be affirmed.

ARGUMENT

I. THIS COURT HAS CONSISTENTLY APPROVED EMPLOYMENT PLANS DEVISED BY PUBLIC AND PRIVATE EMPLOYERS WHICH HAVE IMPLEMENTED AFFIRMATIVE MEASURES TO REMEDY HISTORICAL PATTERNS OF RACIAL DISCRIMINATION.

One of the most distinguishing features of American history has been its constant change and steady growth toward a free and equal society. In a little more than two hundred years the United States has evolved from a fledgling confederation of states which legally sanctioned and enforced the enslavement of blacks, to a thriving fifty-state world leader in which equal opportunity for all its

citizens has become an established motto and an achievable goal.

Tremendous progress has been made in the opening of employment doors to all members of our society regardless of race. In municipalities across the nation efforts have been made to formulate and administer employment policies that will allow those members of society who have historically been barred from the opportunity to reach their potential to do so.

Under the rubrick of the United States Constitution and various Federal civil rights statutes, including the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, municipalities across this Nation have been, and should be, free to implement employment practices which fit the particular needs of the municipality while remaining true to the fundamental precept of equal opportunity for all Americans.

The Constitution clearly calls for equal treatment under the law. This Court, the United States Congress, and state and local governments have consistently recognized that, in light of pervasive past discriminatory practices and the lingering present effects of such practices, affirmative action such as that taken in this case to remedy this discrimination is required. Affirmative action plans of varied types have repeatedly been approved by this Court. In *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), this Court permitted race to be considered as a factor in admission to institutions of higher education. In *U.S. Steelworkers of America v. Weber*, 443 U.S. 193 (1979) this Court upheld the validity of voluntary affirmative action plans in the private sector. In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), this Court approved the setting aside of funds for public works projects for

minority-owned businesses. This Court consistently approves the adoption of various employment policies and practices designed to incorporate all citizens into the workplace. Likewise, it has endorsed several methods of doing so.

The consent decree at issue in this case, approved by the lower courts after a finding of "historical racial discrimination in promotions", *Vanguards of Cleveland, et al. v. City of Cleveland*, 753 F.2d 479, 483 (1985), agreed upon by the Vanguards and the City of Cleveland is a fair and reasonable plan which would remedy the effects of past discrimination which had virtually precluded minority representation in the officer ranks of the Cleveland Division of Fire. It comports with other similar voluntary affirmative action plans which have been approved by federal courts after *Weber*. *Weber* involved a voluntarily adopted affirmative action plan embodied in a collective bargaining agreement which was designed to remedy a conspicuous racial imbalance in the ranks of skilled craftworkers, who at the time were almost exclusively white. It called for the admission of production workers into a training program with the proviso that at least 50% of them be black. In upholding the plan in *Weber* the Court noted that it "*does not unnecessarily trammel the interests of the white employees. The plan does not require the discharge of white workers and their replacement with new black hirees. Nor does the plan create an absolute bar to the advancement of white employees; . . . Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate manifest racial imbalance.*" 443 U.S. 193,208 (1979).

The consent decree upheld by the Sixth Circuit fits well within the perimeters of the guidelines established in *Weber* for voluntary affirmative action plans to be constructed.

rational. The lower courts' decisions should therefore be affirmed.

II. THE THEORY OF FEDERALISM MANDATES THAT LOCAL GOVERNMENTS, BEING CLOSEST TO THE PEOPLE, ARE BETTER ABLE TO IDENTIFY AND SERVE THE NEEDS OF THEIR RESIDENTS AND EMPLOYEES.

Recognizing that equal opportunity is a goal that this Nation strives for, NIMLO believes that the best way to achieve it is to allow local governmental entities to develop employment practices particularly tailored to their needs. Inherent in the theory of federalism is the notion that state and local governments are far more attuned to the needs of their residents and employees and thus more capable of devising employment policies to meet those needs. Cities throughout the country are faced with similar problems of promoting equal opportunity for those to whom it has been denied, while giving due consideration to the rights of all parties affected. Each city should be free to either formulate employment policies or cope with legal challenges according to its particular situation. No other entity is in a better position to know what type of program will or can work best in a municipality than that municipalities local government. That is particularly so in this case where a consent decree was reached after a year of court-supervised hearings and negotiations.

III. CONSENT DECREES SUCH AS THAT AT ISSUE IN THIS CASE ENABLE MUNICIPALITIES TO AVOID COSTLY LITIGATION AND INTERRUPTION OF IMPORTANT LOCAL SERVICES TO THEIR RESIDENTS.

Consent decrees such as the one at issue in this case should be permitted for another reason. In addition to al-

lowing the local participants involved in an employment dispute to negotiate and reach an agreement, a consent decree can serve to avoid costly litigation which can not only disrupt local governmental operations, but cause untoward financial hardship on local governments.

CONCLUSION

Based upon the facts in this case and in accordance with law previously developed by this Court, it is urged that the Sixth Circuit's decision be affirmed to allow consent decrees to be one of the options available to local governmental entities in devising employment practices.

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Supreme Court, U.S.
FILED
OCT 24 1986
JOSEPH F. SPANIOL, JR.

NO. 86-1999

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1985

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, C.L.C.,

Petitioner

vs.

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and
VANGUARDS OF CLEVELAND,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE INTERNATIONAL ASSOCIATION OF BLACK PROFESSIONAL FIRE FIGHTERS AS AMICUS CURIAE SUPPORTING RESPONDENT VANGUARDS

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QUESTION PRESENTED

Whether the consent decree before the Court is in accord with relief permitted under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 1981 and 1981, and the Fourteenth Amendment to the United States Constitution.

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Fallon and Weiler, "Firefighters v. Stotts: Conflicting Models of Racial Justice," 1984 Sup. Ct. Rev. 1.	18,20
Report of the U.S. Commission on Civil Rights, "For all the people. . . By all the people," (1969)	1,3

STATEMENT OF INTEREST OF AMICUS INTERNATIONAL ASSOCIATION OF BLACK PROFESSIONAL FIRE FIGHTERS

The International Association of Black Professional Fire Fighters (IABPFF) was organized in Hartford, Connecticut on October 3, 1970. Its membership is made up of those paid professional fire fighters who are members of black fire fighting organizations. The IABPFF is composed of 85 independent chapters totalling about 6,000 members. One of the chief goals of the IABPFF is to work for reforms in the recruiting, testing, hiring and promotion of black and minority fire fighters.

The IABPFF is concerned about the comparative dirth of black fire fighters in the United States. A 1969 study by the United States Commission on Civil Rights found that "[b]arriers to equal opportunity for minority group members are greater in police and fire departments than in any

other area of State and local government."
U.S. Commission on Civil Rights, "For all the people. . . By all the people."
summary, pp. 12-13 (1969), and that the problems in fire departments were "in many ways worse than those in police departments." Id., main text, p. 86. The Commission found relative to police and fire departments that:

> 5. Barriers to equal employment are greater in police and fire departments than in any other area of State and local government.
> (a) Negroes are not employed in significant numbers in police and fire departments.
> (1) Although 27 percent of all central city jobs surveyed are in police and fire departments, only 7 percent of the black employees in central cities are policemen and firemen.
> (2) Fire departments in most of the cities surveyed employ even fewer uniformed personnel than do the police departments.
> (3) Negro policemen and firemen hold almost no positions in the officer ranks.
> (4) State police forces employ very few Negro policemen. Four of the States employed no

> Negro policemen in the metropolitan areas surveyed.
> (b) Spanish Americans are employed as policemen and firemen on the average less than half as frequently as Anglos.
> (c) Police and fire departments have discouraged minority persons from joining their ranks by failure to recruit effectively and by permitting unequal treatment on the job including unequal promotional opportunities, discriminatory job assignments, and harassment by fellow workers. Minority group hostility to police and fire departments also deters recruitment, and this has not been overcome by the departments.

Id. at 119-120. While conditions have undoubtedly improved somewhat since the study was done, the number of lawsuits involving fire department employment practices in the years since the study, (not to mention the admission by the City of Cleveland to discriminatory practices in the instant case), attests to the relative lack of progress in this area. See, e.g., Dawson v. Pastrick, 600 F.2d 70 (7th Cir. 1979) (East Chicago, Indiana Fire

Department); Firefighters Institute v. City of St. Louis, MO., 588 F.2d 235 (8th Cir 1978), cert. denied, 443 U.S. 904, 61 L.Ed.2d 872 (1979); Davis v. Los Angeles, 566 F.2d 1334 (9th Cir. 1977) vacated and remanded as moot, 440 U.S. 625, 59 L.Ed.2d 642, 99 S.Ct. 1379 (1979) ; Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), cert. denied 421 U.S. 910, 43 L.Ed2d 775, 95 S.Ct. 1561 (1975) (Boston Fire Department); Vulcan Society of N.Y City Fire Dept., Inc. v. Civil Service Commission, 490 F.2d 1333 (7d Cir. 1973); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971) (en banc) (Minneapolis Fire Department); Western Addition Community Organization v. Alioto, 369 F.Supp. 77 (N.D. Cal. 1973), appeal dismissed as moot, 514 F.2d 542 (9th Cir.), cert. denied, 423 U.S. 1014, 46 L.Ed.2d 385, 96 S.Ct. 446 (1975) (San Francisco Fire Department).

In light of such conditions, the

IABPFF has a continuing interest in the initiation and success of genuine and responsible affirmative action programs, and is obligated to its membership to defend such programs whenever and wherever possible. It is the position of the IABPFF that viable affirmative action plans by their very nature serve the best interest of both the minority and non-minority community.

Increased numbers of minority fire fighters, the IABPFF believes, will reduce the number of fire deaths and property loss in all communities, reduce the high rate of false alarms, improve race relations, promote minority group acceptance of fire departments, and provide more equitable promotional opportunities for all.

The IABPFF urges this court to affirm the plan negotiated between the Vanguards of Cleveland, the City of Cleveland, and Local 93.

STATEMENT OF THE CASE

The IABPFF adopts the Statement of the Case submitted by respondent Vanguards.

Amicus IABPFF would stress additionally that at the extensive evidentiary hearings in January and April 1982, both respondent Vanguards and respondent City called several witnesses to testify in favor of the consent decree, in addition to which Vanguards offered 30 exhibits while the City offered 47. The petitioner called only one witness, and offered only one exhibit. Amicus IABPFF notes also that the jurisdiction of the Court was invoked not only under Title VII, but also under Title 42 §§ 1981 and 1983 and ~~the~~ Fourteenth Amendment. Further this case represents actual victims of discrimination rather than non-victims.

SUMMARY OF ARGUMENT

The affirmative action plan embodied in the Consent Decree is in accord with Title VII of the Civil Rights Act of 1964 and the requirements of United States Steelworkers of America v. Weber, 443 U.S. 193, 61 L.Ed.2d 480, 99 S.Ct. 2721 (1979) in that it remedies the effects of past discrimination; does not unnecessarily impinge the interests of non-minorities, and it is temporary. The plan was voluntarily negotiated between the three parties involved, and only after a judicial finding, and admission by the City, of a long history of discrimination in the promotion process of the Department of Fire. More specifically, the plan is also in accord with § 706(g) of Title VII in that all the beneficiaries of the plan are actual victims of discriminatory practices.

The plan is also in accord with race conscious relief allowed under the Equal

Protection Clause of the Fourteenth Amendment to the U.S. Constitution and The Regents of the University of California v. Bakke, 438 U.S. 265, 57 L.Ed.2d 750, 98 S.Ct. 2733 (1978). It is carefully tailored to effect race conscious relief while not violating rights of non-minorities. It does not act as a bar to non-minority advancement, while at the same time ensuring that minorities are adequately and fairly represented in the City of Cleveland Department of Fire.

Finally, the relief accorded is within the equitable power of the Court under Title 42 §§ 1981, 1983, and the Fourteenth Amendment.

ARGUMENT

1. THE CONSENT DECREE IS IN ACCORD WITH RELIEF PERMITTED UNDER TITLE VII.

The validity of a voluntarily adopted affirmative action plan was upheld

by this Court in the landmark case of United States Steelworkers of America v. Weber, 443 U.S. 193, 61 L.Ed.2d 480, 99 S.Ct 2721 (1979). After noting that since these were private parties no equal protection issue was present, this Court held that Title VII of the Civil Rights Act of 1964 did not prohibit such a plan. It was stressed that the legislative history and the language of the act itself supported the view that voluntary efforts to remedy discrimination were preferred by the act, and an interpretation of the act prohibiting all voluntary race conscious affirmative action must be rejected.

Although this court did not attempt to draw the line between permissible and impermissible affirmative action programs, the program in question was acceptable. It reserved for black workers "50% of the openings in an in-plant craft training program until the percentage

of the black craft workers in the plant is commensurate with the percentage of blacks in the local labor force." 443 U.S. at 193. Also, it was designed to break down old patterns of hierarchy; to open up employment opportunities to blacks in areas traditionally closed to them; it did not unnecessarily trammel on the interests of white workers; it did not require the discharge of white workers; it did not constitute an absolute bar to the advancement of white workers; and the plan was temporary. 443 U.S. at 208-209.

Even though the plan in Weber was purely voluntary and involved a private employer, while the plan in the instant case concerns a consent decree and a public employer, many of the facts that favored the Weber plan also support the validity of the plan embodied in the consent decree at issue here.

First of all, while the consent decree is enforceable through contempt

proceedings, it nonetheless retains attributes of "voluntariness." Most notably, the terms of the decree were arrived at via negotiations between all the parties involved, including the leadership of Local 93. In addition, even purely "voluntarily" affirmative action plans are enforceable through suits for specific performance. An action for contempt, while different in form, would have the same purpose and effect.

Secondly, this plan, as was the Weber plan, is meant to break down old patterns of hierarchy, i.e., is remedial in nature. The City admitted to a long history of discrimination in employment and promotion, and the District Court entered findings to the same effect. Indeed, this Court in Weber observed that "[j]udicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial

notice." 443 U.S. at 198, n.1.

The initial hirings in February of 1983 established minority representation levels closely approximating the percentage of minorities that pass the entrance exam, as per Headen v. City of Cleveland, C73-330 (N.D. Ohio). Such percentages are inherently reasonable in light of the fact that the plan in Weber called for representation reflecting the percentages of minorities in the city's labor force, and the fact that here the relevant labor force for the City of Cleveland was 47% in 1980.

Thirdly, the affirmative action plan before the Court does not unnecessarily trammel the interests of white workers. In Weber, 50% of the positions in the training program were reserved for minority workers (a "one to one" promotion ratio). In the case before the Court, non-minority employees received 64% of all promotions during February of

1983, the heaviest period of minority promotions, and a large majority of the supervisory positions in the department remain unaffected by the consent decree. No whites are required to be fired or laid off. As the District Court observed, it is not unreasonable to require those that for so long benefited from such a discriminatory hiring scheme to now share the burden of correcting it.

Finally, the plan before the court, as was the plan in Weber, is temporary. It is set to expire, along with the remedial maintenance levels, by its own terms in 1987. Thus, it has a "life expectency" of no more than four to five years. By contrast, the plan in Weber was to remain in effect until the percentage of black craft workers was equal to the percentage of blacks in the local labor force. Considering the fact that in the first year of the Weber plan only seven

black craft trainees were selected, it can be inferred that that would last considerably longer than the four to five years contemplated by the plan now before the Court.

The consent decree before the Court is also in accord with the "goal" relief ordered in many of the fire fighter cases referenced earlier. In Carter v. Gallagher, supra, the Eighth Circuit Court of Appeals ordered that minorities be hired on a one to two ratio until twenty (20) qualified minorities had been hired. In Boston Chapter, NAACP v. Beecher, supra, the First Circuit Court of Appeals ordered that preference be given minorities in future hiring to remedy the effects of past discrimination. In Davis v. Los Angeles, supra, the Ninth Circuit held that the district court had properly ordered the use of accelerated quotas to eradicate the present effects of past discrimination.

Further, in Firefighters Institute for Racial Equality v. St. Louis, supra, the Eighth Circuit Court of Appeals approved relief which ordered, inter alia, the immediate promotion to captain of all black fire fighters that had passed the discriminatory captain's exam.

Affirmative action relief was also accorded in non-fire fighters' cases. See e.g. Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); E.E.O.C. v. American Tel. & Tel. Co., 556 F.2d 167 (3d Cir. 1977), cert. denied, 438 U.S. 915, 57 L.Ed.2d 1161, 98 S.Ct. 3145 (1978); Chisholm v. United States Postal Service, 665 F.2d 482 (4th Cir. 1981); United States v. City of Alexandria, 614 F.2d 1358 (5th Cir. 1980); United States v. I.B.E.W., Local No. 38, 428 F.2d 144 (6th Cir.), cert. denied, 400 U.S. 943, 27 L.Ed.2d 248, 91 S.Ct. 245 (1970); United States v. City of Chicago,

663 F.2d 1354 (7th Cir. 1981) (en banc); United States v. Ironworkers Local 86, 443 F.2d 554 (9th Cir. 1971), cert. denied, 404 U.S. 984 (1971); United States v. Lee Way Motor Freight, Inc., 625 F.2d 918 (10th Cir. 1979); Thompson v. Sawyer, 678 F.2d 257 (D.C. Cir. 1982).

In light of the case law, the consent decree before the Court is entirely reasonable, is in accord with the relief permitted by Title VII, and should be upheld.

2. FIREFIGHTERS v. STOTTS, IS INAPPLICABLE TO THE CASE AT BENCH AND DOES NOT REQUIRE THE INVALIDATION OF THE CONSENT DECREE.

Petitioner, and the Attorney General as amicus, urge that upon the basis of Fire Fighters Union No. 1784 v. Stotts, ___ U.S. ___, 81 L.Ed.2d 483, 104 S.Ct. 2576 (1984) the affirmative action plan before the Court must fail absent an affirmative showing by each beneficiary of

the plan that he or she was individually discriminated against. This position is not tenable for a number of reasons.

At issue in Stotts and absent here was the authority of the District Court to unilaterally enjoin layoffs according to a bona fide seniority system so that the layoffs would not "undo" the affirmative action plan contained in a consent decree. "The issue at the heart of this case is whether the District Court exceeded its powers in entering an injunction requiring white employees to be laid off, when the otherwise applicable seniority system would have called for the layoff of black employees of less seniority." 104 S.Ct. at 2585. The rest of the decision can be properly viewed as dicta. Those that would complain that the courts below are reading Stotts too narrowly are the same ones that have been for years crying for judicial restraint.

This Court and the courts below should be wary of blurring the distinction between preferences in hiring and promotion, and in layoffs. While the worker in the layoff situation may have been deprived of a contractually vested right, the disappointed employee in the hiring or promotion context has lost nothing more than the next person, whether the selection process is based solely on merit, or is tipped one way or the other by a racial preference. See Fallon and Weiler, "Firefighters v. Stotts: Conflicting Models of Racial Justice," 1984 Sup. Ct. Rev. p. 64 et seq.

The decree in Stotts contained no admission of illegal discrimination; here there was such an admission.

The complaint in the case at bench sought back pay but that relief was

dropped in favor of broad equitable future goals. While it is true that the aim of the plan was to remedy the effects of past discrimination, it did so in a prospective manner, setting future goals for minority hiring and promotions. While no specific individual fire fighter was awarded back pay or retroactive seniority, the beneficiaries of paragraph thirteen of the consent decree were chosen from among actual victims of discrimination who were employees of the Department of Fire as of January 31, 1983. In light of the admission on the part of the City of Cleveland of a long history and practice of discrimination, and a subsequent judicial finding to that effect, all requirements of showing discrimination had been met.

In addition, it would be unwise to extend Stotts, by mere implication, beyond the areas of layoffs and seniority. The courts of appeal are all in accord on

the issue of "goal" relief in Title VII cases. The interpretation of Stotts urged by petitioner and by the Attorney General would in effect overrule this "large body of law." Fallon at 10.

3. THE AFFIRMATIVE ACTION PLAN IS IN ACCORD WITH RACE CONSCIOUS RELIEF PERMITTED UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

In Regents of the University of California v. Bakke, 438 U.S. 265, 57 L.Ed.2d 750, 98 S.Ct. 2733 (1978), Justice Powell suggested that a'government interest in remedying the effects of past discrimination cannot be compelling without

a judicial, legislative or administrative finding of constitutional or statutory violation. The court went on to point out that even though that view was not the opinion of this entire Court, the case at bench would meet that test. City of Cleveland admitted to a long history of discrimination in promotions against minorities [Amended Consent Decree, p. 1] and the District Court's finding in this respect is not challenged by the intervenor union on appeal.

In Regents of the University of California v. Bakke, supra, a majority of this Court held that the Equal Protection clause of the Fourteenth Amendment does not prohibit the consideration of race in affirmative action plans. In that case four members of this court were of the opinion that the special admissions program at the University of California, Davis Medical School was not violative of the Equal Protection clause of the Fourteenth

Amendment. That program reserved sixteen positions out of the entering class of 100 for qualified minority applicants. Minority applicants were free to compete for any of the 100 openings in the entering class. Non-minorities, however, were precluded from competing for the 16 positions reserved for minorities.

Although Justice Powell could not justify upholding this particular affirmative action plan, he agreed with four others that the Equal Protection clause does not prohibit the University from establishing race conscious plans. Justice Powell reasoned that in an acceptable race conscious plan,

> . . . race or ethnic background may be deemed a "plus" in a particular appl icant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats.

438 U.S. 265, 317, and

> This kind of program treats each applicant as an individual in the admission process. The applicant

> who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname.

438 U.S. 265, 318.

The affirmative action plan embodied in the Consent Decree meets the concerns of Justice Powell. In the negotiations that led to the consent decree, the City agreed to make 45 minority promotions not already planned for. Thus, the pre-existing expectations of non-minority fire fighters were not disappointed.

In William v. City of New Orleans, 543 F. Supp. 662 (E.D. La. 1982) the District Court approved provisions of a similar plan, i.e., new minority promotions rather than minority promotions that would displace non-minority promotions. In approving the plan the District Court reasoned as follows:

> Article VI of the decree, governing promotions, operates in two stages. The first stage calls for the immediate creation of 44 supervisory positions and the promotion of black candidates to fill these positions.
>
> Because the 44 positions would not exist but for the decree, the injury to nonblack candidates is limited to their exclusion from consideration for these new positions; pre-existing expectations are unaffected. The duration of the decree also is not troubling in the case of immediate promotions, since no ongoing action by the defendants is required. Reserving the newly created positions exclusively for blacks is a swift and potent remedy for underrepresentation in supervisory ranks, yet it does not pervasively intrude on the interests of other officers. Most importantly, the burden of this remedy falls on the defendants themselves, who must finance and staff the new positions, not on other employees.

543 F. Supp. 683-84. And in Fullilove v. Klutznick,

448 U.S. 448, 65 L.Ed.2d 902, 100 S.Ct. 2758 (1980)

Chief Justice Burger wrote as follows:

> It is not a constitutional defect in this program that it may disappoint the expectations of non-minority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a "sharing of the burden," by innocent parties is not impermissable.

448 U.S. at 484. In any event, how can it be said that those non-minority employees who have for so long reaped the benefits of discriminatory promotion practices are "innocent" victims? They are the beneficiaries of an illegitimate heritage; as between them and innocent minorities, there is much to be said in favoring minorities.

The affirmative action plan embodied in the Consent Decree was established only after a judicial finding and admission on the part of the City of a long history of racial discriminaton in hiring and promotions. It is a temporary measure designed to overcome the present and future effects of past discrimination. No unqualified personnel will be promoted solely because of his or her race, nor will anyone be denied promotional opportunities "because he was not the right color or had the wrong surname." 438 U.S. 265, 318.

The plan is "carefully tailored" to achieve its goal while at the same time respecting the interests of the non-minorities to the greatest extent possible.

There is no conflict between this plan and the Fourteenth Amendment to the Constitution of the United States.

4. COURTS HAVE BROAD EQUITABLE POWERS TO FASHION REMEDIES TO CORRECT DISCRIMINATION.

It is important to note that racial discrimination must be corrected. In Albemarle Paper Co. v. Moody, 442 U.S. 405, 45 L.Ed.2d 280, 95 S.Ct. 2362 (1975), this Court held that district courts have broad discretion in fashioning Title VII relief. In addition, §1983 cases have also granted relief by ordering the implementation of hiring goals and quotas. See, e.g., Carter v. Gallagher, 452 F.2d 315, 327-332, (8th Cir. 1971) (en banc),

cert. denied, 406 U.S. 950, 32 L.Ed.2d 338 92 S.Ct. 2045, (1972). If this Court says there is no way to correct it because in order to do so everyone who benefits from affirmative action must have been a victim, then such a remedy by its terms would limit real change so that each case would have to be brought for a specific remedy for a specific plaintiff and the remedies it set forth in Brown v. Board of Education, 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct. 686 (1954) could not be available.

In happier days when the Attorney General's office was interested in justice for blacks, the United States brought suit against a number of craft unions in Seattle, United States v. Ironworkers Local 86 et al., 443 F.2d 544 (9th Cir. 1971), cert. denied, 404 U.S. 984, 30 L.Ed.2d 367, 92 S.Ct. 447 (1971), and the late distinguished Chief Judge William Lindberg fashioned remedies to combat existing race

discrimination by promulgating a decree that prohibited the defendant unions from engaging in discrimination by providing for a number of blacks in apprenticeship classes. In Local 86 as in this case constitutional rights had been violated and would have continued to be violated if there was no remedy. There Judge Lindberg fashioned a remedy and this court did not interfere with it. The summary in the appendix indicates affirmative action relief permitted under Title 42 §§ 1981 and 1983, and the Fourteenth Amendment.

In Maehren v. City of Seattle, 92 Wn.2d 480, 599 P.2d 1255 (1979), cert. denied, 452 U.S. 938, 69 L.Ed.2d 951, 101 S.Ct. 3079 (1980), the City of Seattle fashioned a remedy to deal with past racial discrimination through selective certification. The Washington State Supreme Court affirmed that procedure in a well reasoned opinion by the late Justice

Charles Stafford and again this Court did not interfere. 452 U.S. 938.

For the U.S. Supreme Court to interfere in local government attempts to solve the ills of established past discrimination because there is a change in the Attorney General's Office is to do what Justice Jackson suggested when he spoke about the court's decision being one ticket good for one ride, one day, on one train.

This court should exercise judicial restraint in not dictating to local governments about their attempts to correct past abuses, especially when majority workers are not being deprived of any rights and only expectations.

In a continuum, the loss of a job after 15 years is one thing.

The loss of an opportunity to get a job is another and the loss of a chance of promotion at some indefinite future time is still another. Is that remote contingency too high a price to pay to correct discrimination and injustice?

CONCLUSION

In Stotts, the union was not represented in the action; here Local 93 intervened. In Stotts, a bona fide seniority system was affected contra to Title VII § 703(h). Here no seniority system was involved. In Stotts there was no finding or admission of discrimination; here there were both admissions and judicial findings of discrimination. In Stotts, a collective bargaining contract provision was violated, here it was not. In Stotts the harm suffered by aggrieved

white workers involved lack of jobs they already held--a severe loss of livelihood, here it is only a potential reduction in the possibility of a greater chance of promotion.

For the foregoing reasons, the decision of the United States Court of Appeals for the Sixth Circuit should be affirmed.

DATED: January 21, 1986.

Respectfully submitted,

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	Employer			
	Pub.	Priv.	Jurisdiction	Relief
Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971) (en banc), cert. denied, 406 U.S. 950, 32 L.Ed.2d 338, 92 S.Ct. 2045 (1982)	X		42 U.S.C. §§ 1981, 1983	Minorities hired 1 to 2 until 20 minorities hired.
Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), cert. denied, 421 U.S. 910, 43 L.Ed.2d 775, 95 S.Ct. 1561 (1975)	X		42 U.S.C. §§ 1981, 1983	Minority preferred in future hiring.

	Employer Pub.	Priv.	Jurisdiction	Relief
Bridgeport Guardians v. Civil Service Commission, 482 F.2d 1334	X		42 U.S.C. §§ 1981, 1983	Quota relief.

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	Employer Pub.	Priv.	Jurisdiction	Relief
Davis v. County of Los Angeles, 566 F.2d 1334 (9th Cir. 1977) vacated and remanded as moot, 440 U.S. 625, 59 L.Ed.2d 642, 99 S.Ct. 1379 (1979)	X		42 U.S.C. §§ 1981, 1983	Hiring of 1 black and 1 Mexican to every 3 whites until effects of past discrimination are erased.
Firefighters Institute v. St. Louis, 588 F.2d 235, (8th Cir. 1978), cert. denied, 443 U.S. 904, 61 L.Ed.2d 872, 99 S.Ct. 3096 (1979)	X		42 U.S.C. §§ 1981, 1983	Preferential relief in form of immediate promotion of successful candidates on captain's exam.

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AMICUS CURIAE

BRIEF

No. 84-1999

Supreme Court, U.S.
FILED
JAN 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, C.L.C.,

Petitioner,

—v.—

CITY OF CLEVELAND, et al., and VANGUARDS OF CLEVELAND,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICI CURIAE* IN SUPPORT OF RESPONDENTS SUBMITTED BY THE AFFIRMATIVE ACTION COORDINATING CENTER THE NATIONAL CONFERENCE OF BLACK LAWYERS THE NATIONAL LAWYERS GUILD THE CENTER FOR CONSTITUTIONAL RIGHTS

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NO. 84-1999

IN THE
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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Brief Amici Curiae of the Affirmative Action Coordinating Center; The National Conference of Black Lawyers; The National Lawyers Guild; The Center for Constitutional Rights in support of Respondents.

CONSENT OF PARTIES

Amici Curiae file this brief with the consent of all parties in support of the position advanced by respondents. Letters of consent have been field with the Clerk of this Court.

INTEREST OF AMICI CURIAE

The organizations joining in this brief as amici curiae share a mutual concern that the Court use the decision in this case to advance the commitment to rid our nation of the devastation of racial discrimination and race hatred. They are aware of the difficulty of this task.

These groups believe and argue in this brief that the continuing exclusion of Blacks and other minorities from meaningful political and economic participation in public safety agencies is a legacy of slavery and racial discrimination.

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SUMMARY OF ARGUMENT

The racial discrimination which exists today is a legacy of slavery that has long been a mainstay of the U.S. labor market. The persistent and pervasive exclusion of Blacks from employment, as was the case in Cleveland, is a badge and incident of slavery subject to remedy through statutes such as 42 U.S.C. §1981, the Thirteenth Amendment, and the Fourteenth Amendment. These provisions provide the legal context in which this case should be seen. The violations of law challenged in the district court were not limited to Title VII. Thus, the remedy provided, affirmative actions relief via a negotiated consent decree, cannot be limited by Title VII. The provisions of the negotiated decree are justified by the compelling state interest to eradicate racial discrimination admitted

by the City of Cleveland. Those provisions are wholly consistent with the Thirteenth And Fourteenth Amendments and 42 U.S.C. §1981.

The provisions of the consent decree are also consistent with principles established in United Steelworkers v. Weber, 443 U.S. 193 (1979). Relief went to those against whom discrimination had been practiced, the relief was temporary in nature, and did not unnecessarily trammel the rights of white workers. The remedy provided in the decree also distinguishes this cases from Memphis Fire Department v. Stotts. No rights established pursuant to a bona-fide seniority system are being displaced. Relief is provided to clearly identifiable victims of discrimination. In addition, since the decree was agreed upon by the employer, the district court had no need unilaterallyto modify it over

the objections of the employer as happened in Stotts. Notwithstanding dicta contained in Stotts, the extent of admitted discrimination by the Cleveland Fire Department justifies a race conscious group remedy since the City admitted to violations of the Constitution and 42 U.S.C. §1981 in addition to violations of Title VII.

I. THE CLEVELAND CONSENT DECREE IS CONSISTENT WITH THE MANDATE OF THE THIRTEENTH AMENDMENT WHICH WAS DESIGNED TO ELIMINATE ALL VESTIGES OF SLAVERY.

The 13th Amendment accomplished more than declaring a permanent ban on the auction block. It embodied a profound declaration that, from then forward, slavery, in all its gross and subtle forms, was to be forever forbidden in the

United States. Jones v. Mayer & Co., 392 U.S. 409 (1968). Current forms of racial discrimination are badges of slavery that may be proscribed under the 13th Amendment if they are historically linked with slavery or involuntary servitude. Williams v. City of New Orleans, 729 F.2d 1554, 1579 (5th Cir. 1984) (Wisdom, J., concurring and dissenting). American racial slavery was of course more than shackles and chains. It encompassed economic, social, legal and other forms of deprivations practiced against the American Black population. Its abolition by constitutional amendment in 1865 "extends to the badges and incidents of a slavery system that were imposed upon Blacks as a race." Williams id. at 1578 (Wisdom, J., concurring and dissenting). See also, Civil Rights Cases, 109 U.S. 3 (1883) (Harlan, J. dissenting).

The promise of the 13th Amendment to recast the position of Black Americans in the economic and political life of the United States remains unfulfilled. Black people in the United States continue to be burdened by persistent and pervasive exclusion from meaningful participation in the economy in relation to the opportunity available to whites. The 13th Amendment clearly permits and indeed ought to mandate municipalities voluntarily to remove the ongoing and continuing exclusion of Blacks from employment. This exclusion, amici submit, constitutes one of the most important "badges and incidents of slavery." Jones v. Mayer & Co. General Building Contractors Associations v. Pennsylvania, 458 U.S.375, (1981).

Congress has the power to bar such badges and incidents, and, federal courts, working beneath the illuminating

glare of unfilfulled promise, must, where findings of historical discrimination have been made, craft remedies to effectuate the mandate of "universal civil freedom." Civil Rights Cases, 109 U.S. at 38 (Harlan, J., dissenting).

A. Continuing Societal and Institutional Discrimination Which Results in the Under-Representation of Racial Minorities as a Group in Traditionally Segregated Job Categories and Particularly in Public Safety Occupations, Constitute Badges and Incidents of Slavery.

The United States Commission on Civil Rights recently observed that "it is obvious that discrimination and segregation have not disappeared from American life. The statistical evidence documents this." Report of the U.S. Commission on Civil Rights, A National Not A Special Interest at 33 (1981). Where racial minorities and particularly Black Americans are under-represented in

the economy because of ongoing and institutional discrimination, such may be noted as badges of slavery. "[C]onspicuous racial imbalance in traditionally segregated job categories," United Steelworkers v. Weber, 443 U.S. 193, 208-209, (1979), which retard the entrance of minorities into those positions are likewise relics of a slavery system for which the 13th Amendment envisioned a permanent bar. Equal opportunity for racial minorities remains not merely illusive, but practically non-existent. With respect to government jobs, the court in Williams v. New Orleans, 729 F. 2d at 1579 (Wisdom, J., concurring and dissenting), stated that a "cornerstone of slavery was the race-based denial of equal opportunities, especially in governmental jobs requiring the exercise of authority." It may not be doubted that until recently, Black

participation in public safety occupations was minimal. "The underrepresentation of Blacks on police forces and in fire departments is a badge of slavery; it is a sign, readily visible in the community, that attaches a stigma upon the black race." Williams v. New Orleans, id. at 1580 (Wisdom, J., concurring and dissenting).

The pervasive and persistent exclusion of Black citizens from meaningful participation in local and state public safety agencies is the direct result of a cohesive system of racial stigmatization. Society is significantly defined by those who serve in public safety occupations and the exclusion of Black people from these agencies can be seen as a substitute for the infamous Black Codes. Although some progress may be observed, far too little has been accomplished: "The progress

toward equal opportunity, however, cannot be measured solely by comparing today's social indicators for racial minorities with the figures of 20 years ago. Such numbers show how far Blacks have had to come, not how far they have to go to attain equality in fact. In most areas of our society, even with significant progress, Blacks remain behind in relative terms." U.S. Commission on Civil Rights, at 31.

In the instant case, Cleveland has admitted to "a historical pattern of racial discrimination" in its fire department promotional policies, Vanguards of Cleveland v. City of Cleveland, 753 F. 2d 479, 483 (6th Cir. 1985) and is thus in violation of federal law. Adding force to this conclusion is the fact that the City's discriminatory conduct occurred in an area most emblematic of racial exclusion; that is,

in the public safety sector. For many years in this country's history, public safety jobs were for whites only. Williams v. New Orleans, 729 F. 2d. at 1580 (Wisdom, J., concurring and dissenting). In the North, public safety jobs were the province of whites. Black citizens who went North were both unwanted and unskilled. They entered the labor market at the lowest rung and were in constant competition with newly arrived white immigrants. The obstacles to obtaining a government job were formidable. White immigrant groups successfully closed ranks around government jobs. This was true for Northern police and fire departments that were controlled by groups particularly successful at denying Black workers access. The result of this system, in both the North and the South, was that Black citizens "became trapped in a

system of social and economic bondage that transformed the constitutional promise of equality for Blacks into a condition of poverty." U.S. Commission on Civil Rights, at 10 (footnote omitted).

With traditional avenues of employment and advancement effectively foreclosed, America's Black communities erupted in rebellion during the 1960s. One result of these explosions was the creation of several "blue ribbon" commissions, whose duty was to study the genesis of these rebellions. One conclusion of the National Advisory Commission on Civil Disorders (Kerner Commission), was that the appointment of Black people to public safety occupations had to be a major priority for Northern communities, particularly those with substantial minority populations. The necessity behind such action was not

framed merely on its justice; increasingly a dose of practicality was added to justify the long overdue application of equal opportunity to the public safety sector. One court has well described it: "unless the public safety departments of a city reflect its growing minority population, there is bound to be antagonism, hostility and strife between the citizenry and those departments. The inevitable result is poor police and fire protection for those who need it most." Boston Chapter NAACP v. Beecher, 679 F.2d 905, 977 (1st Cir. 1982).

In few areas of public life in America has discrimination been so clear and pervasive and its consequences so violent as in the area of public safety.

Such a "lack of employment opportunity for Blacks" in public safety agencies throughout the United States is "closely linked to the former system of

slavery." Williams v. New Orleans, 729 F. 2d at 1580 (Wisdom, J., concurring and dissenting). Continuing hostility which limits the participation of Black workers in public safety jobs is inextricably linked to a time when all Black people were subject to the most intensive forms of legal oppression. All such practices are "sign[s], readily visible in the community, that attach a stigma upon the black race." Williams, id. at 1580.

B. It is Consistent With The Mandate of the 13th and 14th Amendments and 42 U.S.C. §1981, That All Parties, Including Public and Private Employers, Be Encouraged to Take Steps to Overcome the Underrepresentation of Minorities as a Group in Traditionally Segregated Job Categories Caused by Societal and Institutional Discrimination As Well As Particular Employer Discrimination.

The decree entered by the district court here, "like the voluntary plan in Weber, is aimed at breaking down patterns of segregation and opening opportunities

for blacks in traditionally segregated fields." Williams v. New Orleans, 729 F. 2d at 1583 (Wisdom, J., concurring and dissenting).

The Thirteenth Amendment demands that all parties, both public and private, be encouraged to assist in the elimination of these vestiges of chattel slavery and Jim Crow.

All efforts to relieve the effects of a segregated and stigmatized condition resulting in underrepresentation in traditionally segregated job categories are permissible as a means of ensuring the goals and dreams contained in the 13th Amendment. This must be so where a city has admitted to its discriminatory conduct in hiring and promotion of minority firefighters. See Vanguards 733 F. 2d at 485.

42 U.S.C. §1981 has as its "principal object" the eradication of the

Black Codes: General Building Contractors v. Pennsylvania, 458 U.S. 375, 386, (1982). The Black Codes were blatant attempts on the part of the defeated South to "keep the Negro, as long as possible, exactly what he was: a propertyless rural laborer under strict controls, without political rights, and with inferior legal rights." Stampp, The Era of Reconstruction, 1865-1877 (1965).

The "paramount aims" of §1981 were described by its author to "'destroy all those discrminations, and to carry into effect the [Thirteenth] amendment.'" General Building Contractors v. Pennsylvania, 458 U.S. at 387, quoting Cong. Globe, 39 Cong. 1st Sess. 474 (1866) (remarks of Sen. Trumbull).

Section 1981 and its companion §1982 were both enacted by Congress as the Civil Rights Act of 1866. In addition to rolling back the outrageous attempt to

reimpose slavery through the Black Codes (described by one historian as placing "the Negro in a kind of twilight zone between slavery and freedom," Stampp, supra, at 80) Congress "was moved by a larger objective--giving real content to the freedom guaranteed by the 13th Amendment." Jones v. Mayer, 392 U.S. at 439.

Section 1981 was "intended to implement the 13th Amendment and eliminate the vestiges of slavery." Detroit Black Officers Association v. Young, 608 F.2d 671, 691 (6th Cir. 1979). "What the Constitution forbids generally, §1981 forbids with some specificity." DBOA v. Young, id. at 692. Enacted to implement the command of the 13th Amendment, §1981 is violated where the contract or employment rights of Black workers are put in jeopardy through racial discrimination.

The district court found here that "the documents, statistics and testimony presented. . . reveal a historical pattern of racial discrimination in promotions in the City of Cleveland Fire Department," see Memorandum Opinion and Order of the District Court (Jan. 31, 1983), Appendix A3-A4. This finding was explicitly upheld by the Court of Appeals. 753 F.2d at 479, 481, 485. As §1981 is "direct and primary" legislation, authorized by the 13th Amendment, it is appropriate for a municipality to avoid a strong possibility of §1981 liability imposed upon it by voluntarily agreeing to an affirmative action plan. Williams, 729 F. 2d at 1566.

A race conscious affirmative action plan, undertaken voluntarily by the City following a judicial finding of discrimination in hiring and promotions,

is necessary in this case for the protection and enjoyment of the civil rights of Cleveland's Black firefighters. Such a plan, which is tailored to be temporary and does not unnecessarily trammel the interests of white workers, must be viewed as not merely an appropriate remedy but as a fundamentally constitutional one. The Cleveland decree implements the core presumptions of the true spirit of the 13th and 14th Amendments: to declare universal freedom to Black Americans and to prevent the reimposition of former badges and vestiges of slavery.

II. THE CLEVELAND CONSENT DECREE IS CONSISTENT WITH THE MANDATE OF THE FOURTEENTH AMENDMENT.

A. The District Court's Undisputed Finding of an History of Discrimination Warrants the Implementation of a Race Conscious Remedy Pursuant to the Fourteenth Amendment.

In approving the Cleveland consent decree the district court found

that:

> ...
> there has been a long history of discrimination against minority persons in the hiring practices and the promotion practices of the City of Cleveland Division of Fire;
> ...
> prior litigation has confirmed the existence of this history of discrimination [See Headen v. City of Cleveland, U.S. District Court, Northern District of Ohio, Eastern Division, No. (73-330) but has failed to effectively eliminate the present effects of such discriminatory practices;
> ...
> many of the practices used in the past to discriminate against minority applicants for promotion in the Cleveland Division of Fire were substantially similar to those used by the Cleveland Division of Police
> . . .

Vanguards of Cleveland v. City of Cleveland, Amended Consent Decree, Appendix to Petition for Writ of Certiorari to U.S. Court of Appeals for the Sixth Circuit, A29-30.

There has been a full and complete determination by a federal court that Cleveland had been engaging in long-standing historical racial

discrimination. Appendix 4-5. Prior litigation in Cleveland revealed a similar pattern of discrimination against minority police officers.[1]

Lastly, it must be noted that Judge Lambros, in entering the decree, explicitly found the City had violated

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[1]The earlier litigation, known as the Shield Club Litigation, see Shield Club v. City of Cleveland, 370 F. Supp. 251 (N.D. Ohio 1971) is of importance. Lasting nearly 8 years it culminated in the court finding discrimination in selections promotions as well as assignment and transers within the Cleveland police department. Judicial approval of a plan submitted by the City in 1977 embodied a form of limited race conscious relief governing future hiring in the Fire Department."

Thus, Cleveland was fully aware of its own prior discriminatory conduct regarding the spectrum of employment practices in its public safety agencies. It is an unusual legal analysis indeed, which would mandate that a city, so fully cognizant of its long history of discrimination, be barred from entering into a decree, expressly designed to eliminate the historically exclusionary policies. Weber clearly commands otherwise.

the 14th Amendment, through its racial exclusion in the Fire Department. This case is thus a case markedly different from Bakke, where no judicial determination of racial discrimination secured the university's affirmative action plan. See Regents of the University of California v. Bakke, 438 U.S. 255 (1978) (Opinion of Powell, J.). This is therefore an appropriate opportunity for this Court to affirm its holding in Weber that race conscious affirmative action may proceed where it is designed to "eliminate traditional patterns of racial segregation." Weber, 443 U.S. 193, 201, (1979). For here, there is not merely a statutory violation but an express conclusion by a United States District Court that the City of Cleveland, had, through its conduct, violated the Fourteenth Amendment rights of minority firefighters.

Where a court has made judicial determinations of past historical discrimination, a compelling interest is created, under which the party must cure its past illegal conduct. The First Circuit has concluded that the "fact of past discrimination agreed to" by the governmental unit "constitutes a 'compelling need' for a minority conscious remedy." Boston Chapter NAACP v. Beecher, 679 F.2d 965, 977 (1st Cir. 1982). Such a compelling interest has arisen here where the district court and the Sixth Circuit have determined that the City has engaged in past historical discrimination. That the State or its sub-units has a duty to remedy the consequences of its discriminatory conduct is well established. See Green v. County School Board of New Kent County, 391 U.S. 430, 437-438 (1968). It is equally well settled that this duty is

a continuing and affirmative one. See Columbus Board of Education v. Pennick, 443 U.S. 449 (1979). Cleveland's conduct, that of affirmatively and volunterily acting to remove from its municipal fire department long standing discriminatory practices, ought not to serve as a basis by which to censure the city. Cleveland has "an affirmative obligation to eliminate the continuing effects of past racial discrimination and to eliminate all racial discrimination, 'root and branch.'" NAACP v. Detroit Police Officers Association, 591 F.Supp. 1194, 1200 (E.D. Mich. S.D. 1984), quoting Green v. County School Board of New Kent County, 391 U.S. 430, 438, (1968).

The Cleveland affirmative action remedy to which the City agreed after it was found to have violated the 14th Amendment is race conscious. It is a

"properly formulated affirmative action plan aimed at achieving racial equality of employment." Williams v. New Orleans, 729 F. 2d. at 1574-75 (Wisdom, J., concurring and dissenting)(footnote omitted).

Even if we examine the Cleveland plan through the lens of strict scrutiny, it would be lawful since once a governmental unit has been adjudicated to have engaged in racial discrimination, "the Constitution imposes on states a duty to take affirmative steps to eliminate the continuing effects of past discrimination." Detroit Police Officers Association v. Young, 608 F.2d 671, 691 (6th Cir. 1979). (See Regents of the University of California v. Bakke, 438 U.S. 265 (1978)(opinion of Powell, J.). The state's compelling interest to cure the effects of past discrimination in its

own workplace and to ensure an integreated workforce is thus a strong one.

The 14th Amendment plainly forbids a state from engaging in invidious discrimination against Black people. Brown v. Board of Education, 347 U.S. 483 (1954). Where there are present effects of past discrimination found by a court, the State must eradicate these unlawful practices. The State has an obligation to do so, and that duty is compelling. Minorities whose group-based rights have been burdened by historical race oppression can only be made whole when the State, acting under this duty, moves to eliminate the roots and branches of its past discriminatory conduct.

B. The Weber Test is Applicable to Affirmative Action Plans by Government Employees.

This Court in United Steelworkers v. Weber, 443 U.S. 193, (1979), crafted the

test which must be applied to this case. An application of the Weber test affirms the constitutional validity of the decree at issue here.

In Weber, the Court confirmed that voluntary race conscious affirmative action plans were not barred by Title VII. Weber, 443 U.S. at 201. Here, we are presented with a municipality which has admitted to prior historical racial discrimination, itself violative of a constitutional and statutory command. Cleveland has entered into a decree designed to remedy its own prior racially discriminatory conduct. This decree seeks to cure the past racial discrimination through a temporary and appropriately tailored race conscious promotional quota. Weber is correctly applied because that case recognizes the correctness of employing "voluntary race conscious affirmative action," Weber 443

U.S. at 204, particularly in areas of traditionally segregated job categories.

Where a voluntary affirmative action remedy meets each of the tiers of the standard articulated by this Court in Weber, it must be upheld. The Cleveland decree meets each step of the Weber standards. Thus, Justice Brennan in Weber found that the Kaiser-USW agreement was lawful where it was remedial in nature, that relief went to those against whom discrimination had been practiced; that it was temporary in nature, and did not unnecessarily trammel the rights of white workers.

The decree entered into by the City and the Vanguards, falls well within the parameters outlined in Weber. The City's admitted-to historical discrimination "clearly established a substantial state interest in some remedial action."

Vanguards, at 753 F. 2d. 485. As the Cleveland decree will remain in effect for only 4 years, it is most appropriately temporary in nature. Since the court below found the City to have engaged in long standing discriminatory conduct, there is a strong likelihood that it "is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." Weber v. Kaiser Aluminum, 443 U.S. at 208

Additionally, the Cleveland decree entered into by the parties is particularly remedial in that relief goes to those whom the district court found to be burdened by the discrimination--Black firefighters in the Cleveland Fire Department. Relief goes to those firefighters already on the force at the time the decree was entered. This class was thus determined to be the "victims" of historical racial discrimination. The

decree is premised upon the lower court's finding that the Vanguards had made out their "claims under the Thirteenth and Fourteenth Amendments." See Petition for Writ of Certiorari, Appendix, A32. As argued above, where the past effects of slavery, such as Jim Crow, or legal or de facto segregation has resulted in racial stigmitization, such racially stigmitizing practices are barred by the force of the 13th and 14th Amendments. Equally important is the recognition that the State has an affirmative obligation to overcome present discrimination once found by the Court. Swann v. Charlotte Mecklenburg. 402 U.S.1. In this case, both lines of argument converge to demonstrate that where this plan provides relief to those adjudged as victimized by historical race discrimination, such a plan must be upheld. Not only does it meet the Weber

standard, but it is also supported in a broader constitutional context.

Finally, the Cleveland decree "does not unnecessarily trammel the interests of the white employees." Weber, 443 U.S.at 208. It does not contemplate the discharge of any white employees nor does it call for their replacement by minority workers. No "absolute bar to the advancement of white employees" is planned. Id. In fact, a closer analysis of the decree reveals modest and reasonable advancements for minority firefighters already on the force over the life of the plan. The central feature of the new plan was the creation of substantially more promotional opportunities for firefighters of all races. Since it went into effect, a substantial number of all promotions in the Department have gone to non-minorities. It is clear that no

whites have been adversely affected by the operation of the decree.

This recital leads inexorably to the conclusion that the Cleveland decree may be upheld under a Weber analysis. In Weber, this Court took judicial notice of the extensive, long standing "exclusion from crafts on racial grounds." 443 U.S. at 199, fn. 1, (1979). In Vanguards, the district court found a similar pattern of historical racial discrimination against Black workers in the fire department. The Sixth Circuit's affirmance of the decree in no way disturbed this critical finding. Indeed, in assessing the plan's validity, the Court of Appeals borrowed approvingly from Judge Lambros' opinion that the decree was "'a fair, reasonable and adequate resolution of the claims raised in this action.'" Vanguards 753 F. 2d. at 483.

Where parties voluntarily enter into a consent decree appropriately designed to remedy historical racial discrimination which has been explicitly found by two federal courts, and confirmed by more than a decade of litigation involving minority candidates and employees for public safety occupations, the result is clearly both consistent with and indeed mandated by the holding in Weber. The long standing, pervasive discrimination Black workers have faced in securing employment in public safety agencies has been demonstrated above. Given that historical fact and the express judicial conclusion that Cleveland has engaged in historical discrimination, the decree here is demonstrably a "race conscious effort[s] to abolish traditional patterns of racial segregation and hierarchy." Weber, 443 U.S. at 204.

III. THE JUSTICE DEPARTMENT'S INTERPRETATION OF TITLE VII SHOULD BE REJECTED.

A. This Case is Distinguishable From Stotts.

The Department of Justice would have this Court turn its face away from the clear intent of the framers of Title VII, which was to provide a broad and potent remedy against racial discrimination in employment. The Justice Department maintains that relief may go only to those persons individually determined to have been actual victims of discriminatory conduct. The clear result of such a proposition would be to bar most, if not all, race conscious relief. It is settled that in passing Title VII, "Congress chose not to forbid all voluntary race conscious affirmative action." Weber, 443 U.S. at 203 Moreover, the outcome of the government's position would be to veto nearly 20 years of Title VII litigation as well as to

roll back the substantial, remedial impact the Act has had on the minority community in America.

The lower courts determined there to be a class of Black firefighters whose constitutional and statutory rights had been violated by the operation of long standing discriminatory employment practices. Black workers were seriously underrepresented in the top officer ranks of the Cleveland Fire Department. "In 1982 there were only ten minorities holding the ranks of Lieutenant and above in the Cleveland Fire Department. These ten minorities constituted a mere 4.5% of all the supervisory positions in the Department. . . By contrast, the percentage of minorities residing in the City of Cleveland in 1982 was in excess of 47%." Respondent Vanguards of Cleveland Statement of the Case, 13.

The City accepts its past discriminatory conduct and is seeking to make whole the victims of this unlawful conduct. The Justice Department, however, asks this court to limit the scope of the relief available here and in similar cases to only those identifiable, individual victims whose statutory rights have been adjudicated as being violated. Such an extreme and uncalled for view certainly would give birth to the nightmare hypothesized by this court in Weber which is equally applicable to a public sector context:

> It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long,' 110 Cong. Rec. 6552 (1964) (remarks of Sen. Humphrey), constituted the first legislative prohibition of all voluntary, private race conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

Weber, 443 U.S. 193, 202.

The extraordinary outcome requested by the Department of Justice--that victim specificity is required before a court may award Title VII relief, has been denied by a majority of the lower courts which have confronted affirmative action remedies and limited Stotts to its facts and circumstances.

It is inconceivable that the Court in Stotts meant what the Justice Department maintains. It is hardly in keeping with the practice of this Court to so extraordinarily depart from its prior jurisprudence without so much as a clue that such a course was being undertaken. The expansive interpretation given to Stotts by the government that it eliminates all race conscious relief except that benefitting specifically identified victims of past discrimination, must be rejected here. Such an overarching jettisoning of

nearly 20 years of legal interpretation given to Title VII litigation could not be subsumed with the confines of the Stotts decision as maintained by the Justice Department. Such a thorough sub silentio overhaul of anti-employment discrimination law could not convincingly have taken place without the Court having been far clearer as to its intent. As the Sixth Circuit concluded, "[T]o read Stotts as invalidating the present plan as impermissible under Title VII is to conclude that Stotts sub silentio overruled Weber. We believe that the Court would have expressly addressed Weber had it intended" to do so. Vanguards, 753 F. 2d at 488. Amici fully endorse that view.

That the plan here is distinguishable from the relief struck down in Stotts is plain. Initially, unlike Stotts, employee rights

established under a bona fide seniority system are not being displaced. Stotts, __ U.S. __, 104 S.Ct. at 2586. Secondly, Stotts is inapplicable as the basis for which to strike down the Cleveland plan because here there were very clearly identifiable victims. This Court implied in Stotts that Title VII make-whole relief go "only to those who have been actual victims of illegal discrimination." Stotts, 104 S.Ct. at 2589. Here, however, the district court concluded that the City had engaged in "a long history of discrimination against minority persons in the hiring practices and the promotion practices of the City of Cleveland Division of Fire." Petition for Certiorari. The district court thus identified the "actual" victims of Cleveland's illegal and unconstitutional conduct as minorities within the fire deparment.

No similar conclusions of discriminatory conduct were made in Stotts. Instead, this Court in holding that the district court erred in modifying the consent decree over the objection of the city of Memphis observed, "There were no findings that any of the blacks protected from layoff had been a victim of discrimination." Stotts, id. at 2588. As demonstrated above, Judge Lambros very plainly concluded that the City of Cleveland had engaged in historical promotion-related discrimination against Black firefighters. This critical factor amply distinguishes the Vanguards litigation and its resolution from that of Stotts.

Finally, Stotts was a case decided solely on Title VII grounds. Justice White's opinion for the majority did not reach beyond a discussion of the clash

between the district court's action and Title VII. In this litigation, however, the remedy is justified not merely by Title VII. The district court judge stated, "plaintiffs have stated claims under the Thirteenth and Fourteenth Amendment to the United States Constitution; 42 U.S.C. §1981; 42 U.S.C. §1983" in addition to Title VII. Petition for Writ of Certiorari, Appendix-Amended Consent Decree of the District Court (Jan. 31, 1983) at A32.

Thus the decree is not only lawful under the Civil Rights Act of 1964, but is constitutional by force of the 13th and 14th Amendments. The relief granted below had a broad constitutional basis. It is thus wholly distinguishable from Stotts.

B. Ongoing Societal and Institutional Discrmination and its Effects Upon Minorities Calls For Group-Based Remedies.

Discrimination against a class demands relief to the class. Otherwise, little impact will be made on the virulent forms race discrimination has taken in the United States. To propose any less than relief aimed at institutional restructuring for a class subjected to racial subordination precisely because of their skin color, is to slow down movement toward equal opportunity. "When a vice is inherent in a system, the vice can be eradicated only by restructuring the system." Williams, 729 F. 2d. at 1573 (Wisdom, J. concurring and dissenting). Thus, "when faced with our society's systematic racial discrimination against blacks as a race, an effective remedy must be color conscious." Id at 1573.

Where lawful remedies are restricted under Title VII solely to identifiable victims, the result will be token or

isolated minority group representation. More than likely, that labor force is only minimally, if at all, integrated. Where minority representation is limited to token representation, the likelihood is high that the minority worker will be and remain isolated in his/her job. Flowing directly from this is an increased potential for poor job performance. Thus, group remedies are demonstrably more efficient because they (a) will not leave only token minority representation in a workforce, (b) will provide a community context for minority workers to develop within, and lastly, (c) will actually further equal opportunity since they will retard victim isolation which leads to poor performance.

Discrimination against Black people is not based on individual traits. Rather, it is clearly premised on a group

trait: racial identity. For until recently, "ours was a Nation where, by law, an individual could be given 'special' treatment based on the color of his skin." Bakke, 438 U.S. at 401, (Marshall, J., dissenting). Accord Williams v. New Orleans (Wisdom, J., concurring and dissenting). Thus, group-based discrimination must be cured through group-based relief. Such remedies are founded upon "The intuition that the historical circumstances of black Americans define a morally special case." Fallon and Weiler, Firefighters in Stotts: Conflicting Models of Racial Justice, 1984 Sup. Ct. Review, 46.

The recognition of racial discrimination in the law calls for a view of the connectedness between members of a victimized group. Consequently, relief for victims of racial discrimination must serve not merely a

particular harmed individual but rather must save a broader community based function. Speigelman, Court Ordered Hiring Quotas After Stotts: Narrative on the Rule of the Moralities of the Web and the Ladder in Employment Discrimination Doctrine, 20 Harvard Civil Rights-Civil Liberties Law Review 338 (1984).

The social consequences of denying a minority person a job are broad and often grim. Its effects on his/her children may be such as to reinforce cycles of frustration and failure. Job discrimination denies minority communities role models or a critical infrastructure of individuals whose successes propel them forward as leaders or spokespersons. Without such individuals, the minority community is certainly likely to be less economically viable. Of course, the social injury incident to unemployment and the

frustration of joblessness is also dramatically clear in crime statistics.

A cure for this recipe for social depression and disorganization is clearly seen when group remedies are viewed in light of the connectedness of the injury. Denying people jobs has the adverse consequences detailed above while granting jobs doubtless causes equally positive results. In order for relief to be effective, race based discrimination must be redressed by race based remedies. Title VII was passed to cure pervasive and long standing employment discrimination against Black Americans. Group-based race conscious remedies were clearly not prohibited. Weber, Williams, 729 at 1571. Seen in this light, the Act is not a bar to group-based remedies for minority employees who are victimized first by overt or covert job discrimination solely because of their

race and who are then granted individual employment relief which consists of isolation in a workforce exposing them to possible hostility from white co-workers and with no institutional support network.

Isolation based on race in a hostile atmosphere and the deprivation of minority group individuals from contact or interrelationship with others has long been recognized as a denial of equal educational opportunity. See Sweatt v. Painter, 339 U.S. 629, (1950); McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 637, 70 S.Ct. 851 (1950). And racial imbalance is a "starting point" for framing a remedy in school desegregation cases where once a court finds discrimination the school has an affirmative duty to desegregate. See Swann v. Charlotte-Mecklenburg, 402 U.S. 1 (1971). One Circuit has recognized that

"[E]mployer toleration of a racially discriminatory work atmosphere clearly violates Title VII." Taylor v. Jones, 653 F.2d 1193, 1199 (8th Cir. 1981). See Carter v. Duncan-Huggins Ltd., 727 F.2d 1225, 1236 (D.C. Cir. 1984); Domingo v. New England Fish Co., 727 F.2d 1429, 1437-38 (9th Cir. 1984). Affirming this principle in response to active employment discrimination on the part of the employer, particularly where it is rooted in long standing, historical denial of equal opportunity due to race, is both a logical and just result.

The remedy for a racially discriminatory work environment caused by victim group isolation would be, as in Taylor v. Jones, a change in the composition of the workforce. In Taylor, the Court approved a quota in order to insure non-discriminatory work

conditions. Such a result is consistent with Judge Wisdom's analysis in Williams v. New Orleans, 729 F.2d. at 1573 (Wisdom, J., concurring and dissenting), which calls for a constitutional recognition that race conscious remedies are the only truly effective remedies where "There has been discrimination not against an individual black but against blacks as blacks."

Race discrimination is structural and institutional. See Williams v. New Orleans, (Wisdom, J., concurring and dissenting). Its tentacles sink deep within institutions and will be properly uprooted only through institutional change. When "discrimination in a state governmental unit is system-wide, institutional and the product of a long history of discrimination against blacks as a group to continue what amounts to a caste system," race conscious relief is

appropriate and constitutional. Id. at 1573 (Wisdom, J., concurring and dissenting). Other remedies such as those "limited to identifiable victims will not carry out the mandate" to eliminate all the effects of a racial caste system. Id. at 1580.

In the context of this litigation, the white firefighters in Cleveland cannot be viewed as "i-nocent" victims of the negotiated consent decree. Undeniably, since early in the history of the United States, "[t]he self-evident truths and the unalienable rights were intended . . . to apply only to white men." Bakke, 438 U.S. at 388 (Marshall, J., dissenting). Whites are not, as whites, insular and discrete minorities. Bakke. 438 U.S. 357 (Brennan, J.). Whites do not suffer from present race based subordination linked to a long and odious history of slavery, Jim Crow and

legal segregation. Whites were not subject to massive structural apartheid in the United States soley because of their skin color. While it is true that individual white workers and even various ethnic groups have been victimized at times, no similar virtually permanent marks have sc "endured" as that against Black Americans. Bakke (Marshall, J., dissenting).

The history of racial discrimination has had two major results: one, of course, has been the continuous burden upon Black people because of their race of a system which denied them equal opportunity; the other has been the opening to white workers of jobs and a general skewing of economic benefits to them in the absence of racially-free merit systems. In effect, racial discrimination has wittingly or unwittingly benfitted white workers. But

for the intensity and long standing nature of racial subordination, many white workers would not enjoy the rights and privileges they now have. Nor would they be senior to so many Black workers. The First Circuit in Boston Chapters NAACP v. Beecher, 679 F.2d 905, 977 (1st Cir. 1982), stated it well when it declared: "We also must recognize that whites as a group reaped significant advantages in the past in hiring and promotion at the expense of blacks and hispanics and that a last hired, first fired seniority system perpetuates the past exclusion of minorities."

Such thinking does not stamp out rights and expectations that white workers justifiably have in their jobs. But it must be that where a systemic and pervasive racial discrimination has burdened Black workers solely because of their race, white workers have received

benefits which otherwise would have been hotly competed for. If there are victims to be searched for, let the true measure of that search be "the fact that for several hundred years Negroes have been discriminated against, not as individuals, but rather solely because of the color of their skins." Bakke, 438 U.S. at 400 (Marshall, J., dissenting). And if there are victims, this Court must view them as those for whom "the dream of America as the great melting pot has not been realized," for Black Americans have "never even made it into the pot." Id. at 400-401 (Marshall, J., dissenting).

IV. CONCLUSION

For all of the foregoing reasons, the decison of the Court of Appeals for the Sixth Circuit should be affirmed.

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APPENDIX

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APPENDIX A

AMICI STATEMENTS OF INTEREST

The AFFIRMATIVE ACTION COORDINATING CENTER (AACC) is an organization created by the National Conference of Black Lawyers (NCBL), the Center for Constitutional Rights (CCR), and the National Lawyers Guild (NLG), with the participation of a cooperating network of civil rights, civil liberties, and other organizations. Many network organizations, as well as other groups, have joined as amici in this brief.

The AACC was formed in response to the proliferation of attacks on affirmative action programs. Its purposes are to stimulate and coordinate resources and legal strategies for the defense and expansion of affirmative action programs. The AACC has convened roundtables of civil rights, labor,

women's rights attorneys to discuss the WEBER, BAKKE FULLILOVE, AND WHITE cases.

The AACC publishes an informational newsletter entitled AACC News. It is preparing several plain language publications on affirmative action in education and employment. The AACC has conducted and is planning other activities designed to increase communications and enhance joint efforts by all groups and individuals interested in strengthening effective affirmative action programs.

THE CENTER FOR CONSTITUTIONAL RIGHTS (CCR) was born of the civil rights movement and the struggles of Black people in the United States for true equality. CCR attorneys have been active in cases involving voting rights, jury composition, community control of schools, fair housing, and employment discrimination. Through litigation and public education, they have worked to protect and make meaningful the constitutional and statutory rights of women, Blacks, Puerto Ricans, Native Americans, and Chicanos.

THE NATIONAL CONFERENCE OF BLACK LAWYERS (NCBL) is an activist legal organization of Black lawyers, law professors, judges, and law students dedicated to serving as the legal arm of the Black community. Since its inception in 1968, NCBL has been actively involved in the continuing struggle for equal employment opportunity. Over the past five years, NCBL has led the struggle for the full implementation of the principles of affirmative action that have been affirmed by the Congress and the courts.

The NATIONAL LAWYER GUILD (NLG) was founded in 1937 as a multi-racial and progressive alternative to the American Bar Association. Its commitment to civil rights dates back to efforts to eliminate the poll tax and white primaries. In 1962, the Guild dedicated its full resources to the legal support of the civil rights movement. In support of affirmative action, the Guild has filed briefs in every major affirmative action case to reach this Court.

AMICUS CURIAE

BRIEF

Nos. 84-1999, 84-1656

JAN 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS AFL-CIO, C.L.C.,

Petitioner,

v.

CITY OF CLEVELAND, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, and LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, CITY OF NEW YORK, and NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE AMERICAN CIVIL LIBERTIES UNION AND THE NATIONAL BLACK POLICE ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS CITY OF CLEVELAND, THE VANGUARDS OF CLEVELAND, CITY OF NEW YORK AND STATE OF NEW YORK

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CONSENT OF PARTIES

Petitioners and Respondents have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court.

INTEREST OF AMICI

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nationwide civil rights organization that was formed in 1963 by leaders of the American Bar, at the request of President Kennedy, to provide legal representation to blacks who were being deprived of their civil rights. The national office of the Lawyers' Committee and its local offices have represented the interests of blacks, Hispanics and women in hundreds of class actions relating to employment discrimination, voting rights, equalization of municipal services and school desegregation. Over a thousand members of the private bar, including former Attorneys General, former presidents of the American Bar Association and other leading lawyers, have assisted it in such efforts.

The National Association for the Advancement of Colored People is a New York nonprofit membership corporation. Its principal aims and objectives include promoting equality of rights and eradicating caste or race prejudice among the citizens of the United States and securing for them increased opportunities for employment according to their ability.

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 250,000 members dedicated to protecting the fundamental rights of the people of the United States.

The National Black Police Association ("NBPA") is a nationwide organization comprised of nearly 100 local black police associations representing 720,000 black police officers throughout the United States. Among the purposes of the NBPA is the elimination of discrimination in public safety

departments, particularly in employment with the consequent effect of improving the delivery of public safety services to all members of the community.

Amici have a direct interest in the long-established principle that Federal courts have wide discretion in fashioning remedies for violations of Title VII and may impose classwide numerical relief where necessary. Without such relief in appropriate cases, we and our clients will be impeded — perhaps totally precluded — in our efforts to vindicate the civil rights of minority groups that have historically been victimized by unlawful discrimination.

STATEMENT OF THE CASES

1. *Local 93*

On October 23, 1980, the Vanguards of Cleveland ("the Vanguards"), minority firefighters employed by the City of Cleveland, filed a class action complaint in the United States District Court for the Northern District of Ohio alleging discrimination by the City in the hiring, promotion and assignment of minority firefighters in violation of the Thirteenth and Fourteenth Amendments, Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §§ 1981 and 1983.

The parties then entered into settlement negotiations, and during the negotiations, Local 93 of the International Association of Firefighters ("Local 93") intervened.

The Vanguards and the City filed a proposed consent decree on November 2, 1981. The court held evidentiary hearings on January 7-8 and April 27-28, 1982, to consider Local 93's objections to the proposed decree.

On November 12, 1982, the magistrate reported that a settlement agreement had been reached by the three parties. The agreement, which contained promotional goals for minority firefighters, was later rejected by the membership of Local 93.

The Vanguards and the City then submitted another proposed consent decree that was substantially the same as the

plan negotiated by the leaders of Local 93 but rejected by the Local 93 membership. Local 93 opposed court approval of the decree.

The district court adopted the proposed consent decree on January 31, 1983. The court found that the evidence "revealed a historical pattern and practice of racial discrimination in promotions in the City of Cleveland's Fire Department". The court concluded that the affirmative action plan incorporated in the proposed consent decree was a reasonable remedy in light of that discrimination and adopted the consent decree as a fair, reasonable and adequate resolution of the claims.

The Sixth Circuit, after reviewing the district court's findings, held that the district court did not abuse its discretion in approving the consent decree, affirmed the district court's order and denied Local 93's request for a rehearing en banc.

2. *Local 28*

The Department of Justice instituted this action in the United States District Court for the Southern District of New York in 1971 against Local 28 and its Joint Apprenticeship Committee ("JAC")[1] under Title VII of the Civil Rights Act of 1964 to enjoin a pattern and practice of discrimination against nonwhites.[2] Shortly thereafter the EEOC was substituted as plaintiff, the City of New York intervened as a plaintiff and the New York State Division of Human Rights ("State"), initially named a third-party defendant, realigned itself with the EEOC and the City.

After a three week trial in 1975, Judge Henry F. Werker found that Local 28 and the JAC had purposely discriminated against nonwhites in violation of Title VII.

---

[1] Local 28 and its JAC had a long history of involvement in employment discrimination litigation prior to the commencement of this action in 1971. *See State Commission for Human Rights v. Farrell*, 45 Misc. 2d 950, 252 N.Y.S.2d 649 (Sup. Ct. New York Co. 1964); *State Commission for Human Rights v. Farrell*, 47 Misc. 2d 244, 262 N.Y.S.2d 526 (Sup. Ct. New York Co.), *aff'd*, 24 A.D.2d 170, 264 N.Y.S.2d 499 (1st Dept. 1965); *State Commission for Human Rights v. Farrell*, 52 Misc. 2d 986, 277 N.Y.S.2d 287 (Sup. Ct. New York Co.), *aff'd*, 27 A.D.2d 555, 276 N.Y.2d 982 (1st Dept. 1967).

In July 1977, the court entered an order and judgment ("O&J") and appointed an administrator to propose and implement an affirmative action plan ("AAP"). The Second Circuit affirmed Judge Werker's finding that Local 28 and the JAC intentionally violated Title VII, but vacated two provisions of the O&J and the AAP. 532 F.2d 821, 829-33 (2d Cir. 1976).

Judge Werker then adopted, and the Second Circuit affirmed, a revised AAP and Order ("RAAPO") that established a nonwhite membership goal of 29% to be achieved by July 1, 1982, and ordered Local 28 and the JAC to develop the apprenticeship program, to increase and maintain nonwhite recruitment, to maintain detailed records regarding union employment practices and to submit periodic reports summarizing those records. 565 F.2d 31, 33-36 (2d Cir. 1977).

A. First Contempt Proceeding

On April 16, 1982, the City and State moved to hold Local 28 and the JAC in contempt for violating the district court's orders by failing to take the required steps to meet the 29% membership goal by July 1, 1982.

In August 1982, Judge Werker, after studying voluminous evidence, concluded that Local 28 and the JAC had "failed to comply with RAAPO . . . almost from its date of entry" and held Local 28 and the JAC in civil contempt. Local 28's contraventions of court orders included: underutilization of the apprenticeship program; refusal to conduct a general publicity campaign; adoption of an older workers' job protection program; issuance of unauthorized work permits to white workers from sister locals and failure to maintain and submit records as required by RAAPO and the EEOC. The court concluded: "I am convinced that the collective effect of these violations has been to thwart the achievement of the 29% goal of nonwhite membership in Local 28 established by the court in 1975. . . . I have no other recourse but to hold the defendants in civil contempt of court." Judge Werker imposed a $150,000 fine to be placed in a training fund.

B. Second Contempt Proceeding

On April 11, 1983, the City brought a second contempt proceeding, this time before the administrator, charging Local 28 and the JAC with further violations of the O&J, RAAPO and orders of the administrator. The administrator, after a hearing, found that Local 28 failed to provide records required by RAAPO in a timely fashion, that Local 28 and the JAC failed to provide accurate data and that Local 28 failed to serve RAAPO on the contractors who hired Local 28's members. He recommended that defendants again be held in civil contempt.

Judge Werker adopted the administrator's recommendation that Local 28 and the JAC be held in civil contempt and in September 1983 Judge Werker adopted an amended AAP and Order ("AAAPO"), that made six important changes in RAAPO. Among other changes, AAAPO required that one nonwhite apprentice be indentured for every white apprentice and that contractors employ one apprentice for every four journeymen employed. It also established a 29.32% nonwhite membership goal to be reached by July 31, 1987.

The Second Circuit affirmed all contempt relief ordered against Local 28 and the JAC and rejected defendants' arguments that the affirmative race-conscious relief contained in AAAPO was prohibited by Title VII, the Constitution or this Court's decision in *Firefighters Local Union No. 1784 v. Stotts*, 104 S.Ct. 2576 (1984). However, the court carefully reviewed AAAPO to ensure that the relief granted was warranted by the factual findings of the district court. The Court affirmed AAAPO but eliminated the intermediate one-to-one apprenticeship ratio. 753 F.2d 1172, 1183-89 (2d Cir. 1985).

SUMMARY OF ARGUMENT

Title VII was enacted to halt discriminatory employment practices and to eradicate the present and future effects of past discrimination. To achieve these goals, the courts were given wide discretion and authority under section 706(g), 42 U.S.C. § 2000e-5(g), to order effective relief.

Since the enactment of Title VII the Federal courts have adjudicated thousands of employment discrimination cases. In a small number of those cases the courts, after carefully reviewing the evidence presented, determined that a classwide numerical remedy was the only effective and practical remedy sufficient to achieve the goals of Title VII. Every circuit has reviewed the award of such relief in either a litigated decree or a consent decree and every circuit has approved it.

In awarding or reviewing the imposition of numerical remedies, the courts have taken great care to evaluate the remedy awarded in light of the purpose and duration of the goal and its effect on nonminorities. Numerical goals counterbalance deeply entrenched favoritism toward nonminorities and foster inclusion of minorities in workforces from which they had been excluded. When properly utilized and carefully tailored, numerical goals do not result in invidious "reverse discrimination" but simply and fairly bring nonminority employment patterns into line with what would obtain had there been no historical unlawful discrimination against minorities.

Nothing in the plain language of the statute or in the legislative history of Title VII limits a court's choice of remedies to correct a violation of Title VII to "make-whole" relief for identifiable victims of discrimination. As the courts that dealt with employment discrimination cases for over two decades recognized, racial discrimination is by its nature a class wrong and though it is often impossible to identify individual victims, many actual victims exist.

The elimination of classwide numerical relief as a possible remedy would prevent the courts from effectuating the goals of Title VII in the most egregious cases of racial discrimination. Such a result would emasculate Title VII and effectively erase more than twenty years of civil rights progress through the legal system.

ARGUMENT

I. CLASSWIDE RACE-CONSCIOUS NUMERICAL RELIEF IS A PRACTICAL NECESSITY; IT IS SOMETIMES THE ONLY REMEDY THAT CAN EFFECTUATE THE CRITICAL POLICY UNDERLYING TITLE VII.

The central objective of Title VII is to "eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965). The courts, in a continuing effort effectively to promote that policy, have come to the realization that section 706(g) cannot be interpreted, consistent with that objective, to eliminate a court's discretion under Title VII to order numerical relief as the remedy in cases where such relief is necessary.

The failure of other remedies to achieve elimination of "the last vestiges" of discrimination, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975), illustrates the direct conflict between the position of petitioners and the Solicitor General on the one hand, and the policies underlying Title VII on the other.

A. *It Would Be Impossible Effectively To Enforce Title VII Without Classwide Numerical Relief In Appropriate Cases.*

Numerical relief is not required, nor should it be, in every case in which violations of Title VII are found. There have been thousands of employment discrimination cases litigated since the enactment of Title VII; yet courts have found it necessary to impose numerical goals in fewer than 100 of those cases.[7] Nevertheless, courts in every circuit have encountered cases where the purpose of Title VII simply could not be effectuated without the affirmance or imposition of classwide numerical relief. In those cases an injunction reiterating Title VII's prohibition against discrimination or individual make-whole relief would be useless and would result in endless enforcement litigation. A Federal court must have the dis-

[7] That number is derived from reported litigated decrees.

courts to order relief that is determined to be necessary and that will be effective in the specific situation before it.

1. *Ingrained Patterns of Racial Discrimination*

Courts have justified the imposition of numerical relief in several types of situations. In many of the cases where numerical relief has been imposed, discriminatory practices were particularly long-standing or egregious and resulted in total or near total exclusion of minorities. In many instances numerical relief was ordered only after injunctive or other relief failed to eradicate the unlawful discrimination.

In 1974, the Fifth Circuit acknowledged the shortcomings of relief that allowed the actor who committed the discriminatory practices to "self-correct" its own unlawful behavior. *Morrow v. Crisler*, 491 F.2d 1053, 1056 (5th Cir.) (en banc), *cert. denied*, 419 U.S. 895 (1974).

In *Morrow*, the district court found that the Mississippi Highway Patrol had engaged in unlawful discrimination in the employment of patrol officers. Specifically, the court found that while 36.7% of the population of the State of Mississippi was black, the Mississippi Highway Patrol had never employed a black officer. Of the 27 bureaus within the Department of Public Safety, only two had any black employees and these were low level jobs. Of the Department's 743 employees, only 17 were black. The court declined to order affirmative numerical hiring goals or preferences and instead entered a decree enjoining the Mississippi Highway Patrol from future unlawful discrimination and requiring the Patrol actively to recruit black patrol officers. 3 Fair Empl. Prac. Cas. (BNA) 1162 (S.D. Miss. 1971). A Fifth Circuit panel affirmed:

> "Time may prove that the district court was wrong, i.e., that the relief ordered was not sufficient to achieve a nondiscriminatory system and eliminate the effects of past discrimination. But until the affirmative relief ordered has been given a chance to work, we cannot tell." 479 F.2d 960, 964 (5th Cir. 1973).

Moreover, the Court *en banc* reversed and ordered the district court to "fashion an appropriate decree which will have the certain result of increasing the number of blacks on the

Highway Patrol". 491 F.2d at 1055. The Court did not "assume" there was already strong evidence that lesser measures would be ineffective: sixteen months after the entry of the decree, there had been only six black patrol officers hired during a period when 90 patrol officers were added to a total force of approximately 500 troopers. The *en banc* court instructed the district court to order, among other things, some form of affirmative hiring relief such as temporary one-to-one or one-to-two hiring ratios until the patrol was effectively integrated. *Id.* at 1056.

The *Morrow* court recognized that discrimination against a class cannot be eliminated by a mere promise to hire more minorities in the future. The court has an obligation to develop a plan that "works and works now." *Id.*

The need for race-conscious numerical relief is similarly highlighted by a comparison of two cases arising in the Middle District of Alabama, *NAACP v. Allen*, 340 F. Supp. 703 (M.D.Ala. 1972), *aff'd*, 493 F.2d 614 (5th Cir. 1974), and *United States v. Frazer*, 317 F. Supp. 1079 (M.D.Ala. 1970). *Allen* was a private action brought to challenge the exclusion of blacks from employment in the Alabama Department of Public Safety. *Frazer* was an action brought by the Attorney General to challenge racial discrimination against blacks in the employment of persons engaged in the administration of federally financed grant-in-aid programs in several Alabama agencies.

In both cases, the district court, Chief Judge Johnson, made detailed findings of widespread discrimination against blacks in recruitment and hiring highlighted by defendants' nearly total exclusion of blacks from employment. *Allen*, 340 F. Supp. at 705; *Frazer*, 317 F. Supp. at 1087. Judge Johnson ordered relief for specific black victims and prophylactic injunctive relief in *Frazer*, 317 F. Supp. at 1090-93, and interim and long term numerical hiring goals in *Allen*, 340 F. Supp. at 706.

Comparing progress under the *Allen* decree imposing numerical goals on the Department of Public Safety and the

Frazer decree imply enjoining discrimination at a number of Alabama agencies. Chief Judge Johnson stated:

> "The *Frazer* decree has a much wider scope than the *Allen* order, which focuses on only one agency—the Alabama Department of Public Safety—but the decree in *Frazer* lacks the precision achieved in *Allen* through the use of hiring goals. The contrast in results achieved to this point in the *Allen* case and the *Frazer* case under the two orders entered in those cases is striking indeed. Even though the agencies affected by the *Frazer* order and the Department of Public Safety draw upon the same pool of black applicants—that is, those who have been processed through the Department of Personnel—*Allen* has seen a substantial black hiring, while the progress under *Frazer* has been slow and, in many instances, nonexistent. . . . Today the Alabama Department of Public Safety has nearly one hundred (100) blacks employed in commercial jobs in both troopers and support positions. With its eighty (80) black support personnel, the Alabama Department of Public Safety has nearly as many black clerical employees as all seventy-five (75) other Alabama state agencies combined."
>
> "Thus in a radical discrimination in employment type case, when the parties are entitled to relief by reason of the fact that their constitutional rights have been violated, this Court's experience reflects that the decrees that are entered must contain hiring goals, otherwise effective relief will not be achieved."

N.A.A.C.P. v. Allen, sub nom. *United States v. Dothard*, 373 F. Supp. 504, 506-07 (M.D. Ala. 1974) (footnotes omitted).

The facts in *Local 28* also demonstrate that the mere recalcitrance of some employers in complying with Title VII could defeat the purpose of the Act if courts did not have the power to order the discriminating employers to seek to achieve numerical goals by a time certain.

Some employers and organizations have dug in their heels and refused to comply with the mandates of Title VII, even after a judicial finding of violation. In those cases, and in cases in which numerical relief is necessary as a practical matter, courts must have the power to order effective relief.

2. ***Removal of Disparate Impact of Discriminatory Procedures***

Courts have also determined that interim numerical goals are a most effective and efficient method of removing the discriminatory impact of an invalid hiring or promotional test. Interim hiring or promotional goals eliminate the disparate impact of the invalid selection practice, allow employers to begin hiring and promoting immediately and prevent a further violation of Title VII.

For example, affirmative interim hiring goals were properly imposed in *United States v. City of Buffalo*, 457 F. Supp. 612 (W.D.N.Y. 1978), *modified and aff'd*, 633 F.2d 643 (2d Cir. 1980). In *Buffalo*, the district court, after a lengthy trial, found that the City had engaged in a pattern and practice of discrimination against blacks, Spanish-surnamed Americans and women in police and firefighter hiring. The court found, for example, that while 20.4% of the City's population and 17.5% of its labor force were black, only 2.7% of the uniformed police officers and 1.2% of the firefighters were black. 457 F. Supp. at 621. The various tests for police and firefighter hiring were found not to be demonstrably related to job performance. *Id.* at 622-29. At the urging of the Department of Justice, the court entered a final decree which included, among other things, interim hiring goals providing that 50% of new police appointments must be minorities and 25% must be women, such goals to remain in effect until the city developed valid selection procedures or until the percentage of minorities and women in the police department equalled the percentage of minorities and women in the City's labor force. The Second Circuit slightly modified the decree by eliminating its long term aspects and affirmed the rest of the district court's decree including the interim goals:

> "[T]he ratio chosen was appropriate in light of 'the resentment of non-minority individuals against quotas of any sort and of the need of getting started to redress

> past wrongs." . . . The figures chosen here were not unreasonably high in light of the finding of serious discrimination and lack of previous progress, the slow rate of hiring projected in the police department, and the likelihood that prior discrimination had discouraged minorities and women from applying for jobs." 633 F.2d 643, 647 (2d Cir. 1980).

Thus while all police officer candidates must still take and pass the non-valid test, the City's selection of minorities, out of rank order if need be, to satisfy the hiring goal eliminates the discriminatory impact of the test. The interim hiring goals were particularly effective since, after almost six years, the City has still not developed a valid selection procedure. An order requiring the City to develop valid selection procedures without an interim hiring goal would plainly have been ineffective; it also would have turned the district judge into a personnel director, monitoring all new hiring to prevent further Title VII violations.[3]

The promotional goals contained in the consent decree in *Local 93* are similar to the interim hiring goals ordered in *Buffalo*. The promotional goals work to remove the disproportionate impact of the City of Cleveland's admittedly discriminatory promotion procedures and to begin to eradicate the effects of the past discrimination.

The use of interim hiring or promotional goals is particularly important in public sector cases like *Buffalo* and *Local 93*. Without the use of some form of affirmative action there could be no hiring or promoting (until valid selection procedures could be developed). Such freezing of all appointments or promotions in a city's police or fire department could present a hazardous situation to the citizens of the community. *See, e.g.,*

[3] In 1985 the Department of Justice sought to modify the final decree, arguing that after the Court's decision in *Sheet Metal Workers*, the interim hiring goals were unlawful. The district court denied the Department's motion, rejecting the Department's interpretation of *Sheet Metal Workers* as inapplicable. 609 F. Supp. 1252 (W.D.N.Y. 1985). The Second Circuit affirmed. No. 85-6212, slip op. (Dec. 19, 1985), and a petition for certiorari was filed on December 24, 1985 (*sub nom. Vera Americans Police Assn. Inc. v. United States*).

Berkman v. City of New York, 536 F. Supp. 177, 216 (E.D.N.Y. 1982), *aff'd*, 705 F.2d 584 (2d Cir. 1983).

Interim hiring and promotional goals have occasioned very little dispute because they merely end the discriminatory impact of an otherwise unlawful test and are not unfair to nonminorities. They do not discriminate against "better qualified" whites because the selection procedures they correct are not job related; thus "better qualified" applicants cannot be identified. *See Commonwealth of Pennsylvania v. Rizzo*, 13 Fair Empl. Prac. Cas. (BNA) 1475, 1481 (E.D. Pa. 1975).

B. *Victim-Specific Relief Is Often Too Narrow To Achieve The Goals Of Title VII*

The consensus among the courts on the appropriateness of classwide numerical relief is premised in large part upon practical considerations. It is easier to structure complete and fair relief in cases where identifiable individuals have been injured by unlawful discriminatory employment practices. In such cases courts award limited relief that will make those specific, individual victims whole. However, many cases are not limited to findings of individual discrete wrongs against a few identifiable victims but involve long-standing and blatant discrimination against *all* class members.

In many of the most egregious cases, it is impossible to point to a single individual as the victim. For example, given Local 28's long history of intentional discrimination and its reluctance to change its discriminatory practices even after a Court Order, it is certain that the Union rejected many, if not all, black applicants for racial reasons. Further, it failed to keep detailed employment records as required by EEOC regulations, making it virtually impossible to find and identify actual victims of petitioners' discrimination. The only effective remedy in such cases is one benefiting the class as a whole, *see United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 660 (2d Cir. 1971), and it would be unfair to preclude such relief simply because a few (or, indeed, many) class members may benefit even though they were not identifiable victims of discrimination. Petitioners and the Solicitor General contend that even in such a situation, each applicant is required to show that had his or her appli-

cannot have contemplated, as relevant regard to race, he or she would have been hired. That is inconsistent with the fundamental purpose of Title VII.

The Second Circuit in reaffirming the interim hiring goals ordered in *Buffalo*, supra, slip op. at 739, 742, stated:

> "The hiring inequities were serious and were clearly the product of discrimination. The harmful effects were equally serious and broad in scope. The goals were not simply a small number of identifiable persons who might be made whole by a narrowly-drawn 'make-whole' decree but a large group, most of whom could not be individually identified. . . . Such broad discriminatory conduct demands equally broad prospective equitable relief. Otherwise the wrong will not be remedied. 'Make-whole' relief, absent ability to identify the individual victims, would be pointless and ineffective."

This Court, in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), addressed the danger of limiting relief to an overly narrow group of plaintiffs. While *Teamsters* did not pose the exact issue now before this Court, the relief structured by the Court in that case illustrates a basic point denying affirmative relief to non-applicants and other victims of discrimination who cannot readily be identified "would exclude from the Act's coverage the victims of the most entrenched forms of discrimination. Victims of gross and pervasive discrimination could be denied relief precisely because that unlawful practices had been so successful as totally to deter job applications from members of minority groups." *Id.* at 365.[*]

[*] Justice Stewart, writing for this Court, cited Negroes whom courts have granted affirmative relief under the National Labor Relations Act, the model for Title VII's remedial provisions, even though identification of specific victims was impossible. *Id.* at 364 n.47. Justice Stewart also cited several Title VII cases where courts of appeals had held that non-applicants can be victims of unlawful discrimination entitled to make-whole relief. *Id.*

Such a limitation on the equitable powers granted to courts by Title VII

> "would be manifestly inconsistent with the 'historic purpose of equity to secure complete justice' and with the duty of courts in Title VII cases 'to render a decree which will so far as possible eliminate the discriminatory effects of the past.'"

Id., citing *Albemarle*, 422 U.S. at 418.

C. *If Previous Eradication Of Past Discrimination Requires Integration In The Workplace*

There is more to eliminating the "last vestiges" of employment discrimination than simply enjoining discriminatory practices. The lingering reputation of the employer as a discriminatory entity continues to pose a formidable obstacle to minorities seeking entry into the workforce. As the en banc Fifth Circuit pointed out a decade ago in *Morrow*, supra, 491 F.2d at 1056:

> "[W]e are not sanguine enough to be of the view that benign recruitment programs can purge in two years a reputation which discriminatory practices of approximately 30 years have entrenched in the minds of [minorities]. . . ."

On the other hand, if an employer is under an obligation to hire or promote minorities, whether imposed by court-structured relief or agreed to in a consent decree, the certain result will be an increase in minority participation in that employer's institution. An awareness of that participation spreads by word of mouth minorities will no longer perceive as futile efforts to obtain jobs in the same employment sector. See generally *id.*

Injunctions without numerical goals require meticulous faith in the very same employer who felt no obligation to obey Federal statutes outlawing employment discrimination in the first place. The reality is that such faith is often misplaced. See, e.g., *Morrow*, supra, 491 F.2d 1053; *Bushnell*, supra, 373 F. Supp. 504.

II. COURTS ARE INVESTED WITH WIDE DISCRETION UNDER SECTION 706(g) TO ORDER CLASSWIDE RACE-CONSCIOUS NUMERICAL RELIEF WHERE SUCH RELIEF IS NECESSARY TO EFFECTUATE THE PURPOSES OF TITLE VII.

A. *Section 706(g) of Title VII Permits Many Forms of Relief Including Prospective Classwide Affirmative Relief And Make-Whole Relief As Remedies For Employment Discrimination.*

In enacting Title VII, Congress sought to eliminate employment discrimination and eradicate the evils of its existence. To do so, Congress took care to arm the courts with full equitable powers and therefore section 706(g) explicitly authorizes courts "to order such affirmative action . . . as the court deems appropriate." Pursuant to that broad equitable power courts have ordered a wide range of relief for injuries occasioned by discriminatory and unlawful employment practices. *See, e.g., Berkman, supra*, 705 F.2d at 595-96.

"Make-whole" relief is intended "to make persons whole for injuries suffered on account of unlawful employment discrimination". *Albemarle, supra*, 422 U.S. at 418. Petitioners and the Solicitor General concede that much.

Prospective race-conscious classwide relief, including numerical remedies, on the other hand, is directed to the achievement of equality of employment opportunities and the removal of barriers that have operated in the past to favor an identifiable group of white employees over other employees. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971).

Eleven circuits have held that prospective affirmative race-conscious relief including numerical remedies is permissible under Title VII[9] and is sometimes the only effective and practical remedy.

[9] *E.g., Bloomfield v. Stetson*, 678 F.2d 515, 536 (5th Cir. 1982); *Detroit v. United States Postal Service*, 665 F.2d 682, 699 (6th Cir. 1981); *Firefighters Institute for Racial Equality v. City of St. Louis*, 616 F.2d 350, 364 (8th Cir. 1980), *cert. denied*, 452 U.S. 938 (1981); *United States v. City of*

In addition this Court has repeatedly held in other contexts that prospective affirmative classwide race-conscious relief is not only constitutional but a most appropriate means of remedying the effects of past discrimination.[9]

Most recently the government consistently sought the imposition of classwide prospective numerical relief in cases where such relief was necessary to effect complete relief. See briefs filed by the United States at both the district and appellate levels in United States v. Ironworkers Local No. 443, 686 F.2d 544 (7th Cir.), *cert. denied*, 459 U.S. 998 (1982); 9 E.P.D. ¶ 9946 (1982); *Local No. 53 of International Association of Heat & Frost Insulators & Asbestos Workers v. Vogler*, 407 F.2d 1047 (5th Cir. 1969), *cert. denied*, 400 U.S. 943 (1970); *Local 189, United Papermakers & Paperworkers v. United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971), *cert. denied*, 404 U.S. 854 (1971); *Southern Illinois Builders Association v. Ogilvie*, 471 F.2d 680 (7th Cir. 1972); *Associated General Contractors of Massachusetts, Inc. v. Altshuler*, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974); *Associated General Contractors of Connecticut, Inc. v. City of New Haven*, 41 F.R.D. 30 (D. Conn. 1966); *Contractors Association of Eastern Pennsylvania v. City of Philadelphia*, 6 E.P.D. ¶ 8845 (E.D. Pa. 1973), *aff'd*, 484 F.2d 1383 (3d Cir. 1973), *cert. denied*, 415 U.S. 917 (1974); *Boston Chapter, N.A.A.C.P., Inc. v. Beecher*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *Associated Contractors of Essex County, Inc. v. Oswald*, 745 F.2d 808 (3d Cir. 1984); *Associated Contractors, Inc. v. Secretary of Labor*, 460 F.2d 91 (9th Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972); *Southern Illinois Builders Association v. Ogilvie*, 471 F.2d 680 (7th Cir. 1972); *Associated General Contractors of Massachusetts, Inc. v. Altshuler*, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974); *Associated General Contractors of Connecticut, Inc. v. City of New Haven*, 41 F.R.D. 30 (D. Conn. 1966); *Contractors Association of Eastern Pennsylvania v. City of Philadelphia*, 6 E.P.D. ¶ 8845 (E.D. Pa. 1973), *aff'd*, 484 F.2d 1383 (3d Cir. 1973), *cert. denied*, 415 U.S. 917 (1974); *United States v. Ironworkers Local No. 443*, 686 F.2d 544, 553-54 (7th Cir.), *cert. denied*, 459 U.S. 998 (1982). The Eleventh Circuit has approved consent decrees containing numerical relief. *Pennington v. Pierce*, 707 F.2d 1318, 1320 (11th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3420 (U.S. Dec. 20, 1983); *Nos. 83-1099, Turner v. Orr*, 719 F.2d 417, 419 (11th Cir.), *petition for cert. filed*, 52 U.S.L.W. 3080 (U.S. July 11, 1983); *Nos. 83-177*, that has not yet been directly confronted with the validity of such relief under Title VII in a court ordered decree.

[9] *E.g., Fullilove v. Klutznick*, 448 U.S. 448 (1980); ("MBE set aside" of federal funds for minority businesses under provision of the Public Works Employment Act of 1977 does not violate the Civil Rights Act of 1964 or the Constitution); *Regents of the University of California v. Bakke*, 438 U.S. 265, 324 (1978); (Powell, J., joined by White, J.; and at 355-79 (Brennan, White, Marshall and Blackmun, JJ., concurring); (State University may permissibly use race as a factor in admissions); *United Jewish Organizations of Williamsburgh v. Carey*, 430 U.S. 144 (1977); (Reapportionment of voting districts in accordance with specific numerical racial goals is permissible under of the Voting Rights Act of 1965); *McDaniel v. Barresi*, 402 U.S. 39 (1971); (In newly integrated school system, School Board properly took racial figures into account in fashioning school districts); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); (In newly integrated school system, court may properly use racial ratios in both distributing and faculty assignments and order busing); *United States v. Montgomery County Board of Education*, 395 U.S. 225 (1969); (District court may properly order faculty and staff assignments pursuant to flexible racial ratios in order to convert an integrated school system).

v. Allen, *supra*, 493 F.2d 614; *United States v. City of Chicago*, 549 F.2d 415 (7th Cir. 1977); *Local 638*, *supra*, 532 F.2d 821; *EEOC v. AT&T*, *supra*, 556 F.2d 167; *Buffalo*, *supra*, 633 F.2d 643; *United States v. Ironworkers Local 86*, 315 F. Supp. 1202 (W.D. Wash. 1970); *N.A.A.C.P. v. Allen*, *supra*, 340 F. Supp. 703; *United States v. City of Chicago*, 411 F. Supp. 218 (N.D. Ill. 1976); *Local 638*, *supra*, 421 F. Supp. 603; *EEOC v. AT&T*, 419 F. Supp. 1022 (E.D. Pa. 1976); *Buffalo*, *supra*, 457 F. Supp. 612.

Although prospective race-conscious numerical relief is still necessary in certain cases, the Solicitor General now asserts that such relief is unlawful. Petitioners and the Solicitor General assert that the last sentence of section 706(g) prohibits class-wide prospective relief and limits a court's power to awarding make-whole relief to identifiable victims of discrimination.

The Third Circuit rejected that argument in *EEOC v. AT&T*, *supra*, 556 F.2d 167. That court carefully analyzed the "make-whole" language and the legislative history of the last sentence of section 706(g) and held that that sentence was intended to strike an equitable balance between class members seeking relief under Title VII and employers who are subject to the mandates of Title VII. "[T]he sentence does not speak at all to the showing that must be made by individual victims, or class representatives on behalf of class members, or the EEOC on behalf of class members. The sentence merely prevents the employer's defense that the non-hire, discharge, or non-promotion was for cause other than discrimination." *Id.* at 176. *See also Williams v. City of New Orleans*, 729 F.2d 1554, 1559 n.4 (5th Cir. 1984) (en banc):

> By its plain language section 706(g) establishes both make-whole and classwide prospective relief as appropriate remedies for Title VII violations. As recognized by the Second Circuit last month:
>
> > "The source of the court's power to issue broader prospective relief is found in its powers as a court of equity and in the broad language of § 706(g), which authorizes the court to 'enjoin the respondent from engaging in such unlawful practice, and order such affirmative action as may be appropriate, which may include but is not limited to, reinstatement or hiring of employees . . . or any other equitable relief as the court deems appropriate . . . .'"
>
> *Buffalo*, *supra*, slip op. at 742 (emphasis in original).
>
> The court in *Buffalo* noted that section 706(g) sets out a non-exclusive list of possible remedies for Title VII violations including "reinstatement or hiring of employees." The non-exclusivity of the listed remedies is apparent from Congress's insertion of the language "which may include but is not limited to" and the closing phrase "or any other equitable relief as the court deems appropriate." *Id.*
>
> The last sentence of section 706(g) does not refer to or affect in any way the discretionary power given to courts in the language of the first sentence of section 706(g). The last sentence addresses itself only to make-whole remedies and states exactly what it says: no employee will be required to hire, promote, reinstate or award back pay to any specific individual unless that individual was an actual previous victim of discrimination.

II. *Congress Intended To Impose Duties Upon Title VII Defendants To Remedy Discrimination And Endorsed The Courts' Use Of Affirmative Classwide Race-Conscious Numerical Remedies In Appropriate Cases.*

During the floor debates in both houses a common objection repeatedly pressed by opponents of Title VII was that it would take customers away from employers and unions and force them to hire unqualified minorities in order immediately to integrate their work force and to maintain racial balances without any showing or finding that the employer or union had engaged in unlawful discrimination in violation of Title VII.

Of course, the bill proponents did not think so. Representative Celler and Senator Humphrey emphasized the fact that nothing in Title VII required an employer to maintain a racial balance among employees through the use of a quota or to hire unqualified minorities. As this Court noted in *United Steelworkers of America v. Weber*, 443 U.S. 193, 206 (1979), section

703(j) was incorporated in the Dirksen-Mansfield substitute bill to silence the opposition's fears, and to make clear that Title VII did not require the maintenance of a racial balance through use of quotas.

In *Weber* this court recognized that 703(j) provides that nothing in Title VII requires an employer to grant preferential treatment to any group on account of a *de facto* racial imbalance in the employer's work force. *Weber*, *supra*, 443 U.S. at 206-07. The Department of Justice similarly interpreted 703(j), drawing the following distinction:

> "[W]here there has been an *intentional policy of* unlawful racial discrimination resulting in the exclusion of blacks from employment opportunities, as the lower court found here, the limitation on preferential treatment [in 703(j)] has no application." Brief of Appellee United States, at 49-50, filed Feb. 10, 1971, in *United States v. Jacksonville Local 86* (No. 26648 5th Cir.) (emphasis in original).

The passage of the Equal Employment Opportunity Act of 1972, which amended Title VII, emphatically establishes the proposition (if it were unclear before) that classwide numerical relief is a lawful remedy under section 706(g) and does not violate section 703(j). The views of the 1972 Congress expressed during the debates on the amending act are of considerable significance.[7] During the Senate's consideration of the amending act, Senator Ervin, one of the original opponents of the Civil Rights Act, proposed two amendments to S. 2515, the Senate equivalent of H.R. 1746 (the amending bill). The

[7] The EEOC and Department of Justice also discuss their earlier position that the enactment of the 1972 Congress should be accorded great weight in interpreting section 706(g):

> The ruling in *Boreman*, supra n.55 that views of a later Congress should be given little weight in interpreting a provision enacted in 1964, does not pertain here, since in 1972 the remedial provisions of Section 706(g) were amended and expanded. [Opp. Cert. Brief of the Federal Respondents (Department of Justice and the EEOC) filed in *Commonwealth Edison of America v. EEOC*, Nos. 77-240, 242, 243 (Nov. 1977).]

first amendment proposed to add a new section to the bill that would read:

> "No department, agency or officer of the United States shall require any employer to practice discrimination in the reverse by employing persons of a particular race, or a particular religion, or a particular national origin, or a particular sex in either fixed or variable numbers, proportions, percentages, quotas, goals or ranges. . . ."

118 Cong. Rec. 1662 (1972), *Legislative History of the Equal Employment Opportunity Act of 1972*, reprinted in Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare at 1017 (hereinafter "*1972 Leg. Hist.*").

Senator Javits, speaking against the amendment, noted that the amendment would not only restrain a department, agency or officer of the United States but would also affect a court's power to remedy discrimination under Title VII. Cong. Rec. at 1664, *1972 Leg. Hist.* at 1046. Accord id. at 1675, *1972 Leg. Hist.* at 1072 (remarks of Sen. Williams) ("I am clearly afraid . . . that this amendment would strip Title VII of the Civil Rights Act of 1964 of all its teeth. It can be read to deprive even the courts of any power to remedy clearly proven cases of discrimination.").

There can be no doubt that at the time of the debates on the Ervin Amendment Congress was fully aware that courts had ordered classwide race-conscious numerical relief pursuant to their powers under Title VII, and that the Philadelphia Plan, a plan developed under Executive Order 11246 requiring government contractors to meet race-conscious numerical goals, had been sustained by the Third Circuit. Senator Javits during the floor debates described the facts and holdings of two cases and viewed the entire text of each case to be printed in the

[8] [T]he depth of this amendment is much greater than is apparent on the surface because it would purport not only to inhibit or govern actions of the United States but also the courts of the United States through which, once there is a finding or a judgment, the officers of the United States are moved." *Id.* at 1664, *1972 Leg. Hist.* at 1046 (Remarks of Senator Javits).

Congressional Record. *Contractors Ass'n of E. Pa. v. Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971), *reprinted at* 118 Cong. Rec. 1671-75, *1972 Leg. Hist.* at 1047-63, upheld the Philadelphia Plan as being consistent with Title VII.[9] Senator Javits then summarized his objections to the amendment:

> "So, there I believe that the amendment does two things, both of which should be equally rejected.
>
> "First, it would undercut the whole concept of affirmative action as developed under Executive Order 11246 and thus preclude Philadelphia type plans.
>
> "Second, the amendment, in addition to dismantling the Executive order program, would deprive the courts of the opportunity to order affirmative action under Title VII of the type which they have sustained in order to correct a history of unjust and illegal discrimination in employment and thereby further dismantle the effort to correct these injustices." *Id.* at 1665, *1972 Leg. Hist.* at 1048.

[9] Senator Javits also referred to *United States v. Enterprise Association Steamfitters Local 638*, 337 F. Supp. 217 (S.D.N.Y. 1972), "I am told, and I believe the information to be reliable, that under the decision made last week by Judge Bonsal in New York, in the Steamfitters case, an affirmative order was actually entered requiring a union local to take on a given number of minority group apprentices." *Id.* at 1665, *1972 Leg. Hist.* at 1048. Senator Javits also described two cases involving consent decrees negotiated by the Justice Department:

> "In one case, part of the decree required that 100 Negroes and Puerto Ricans be given preference ... in filling future vacancies for which they were qualified.
>
> "In the other case in Kansas, the company agreed to make a good faith effort to hire from these minority groups for 20 percent of the clerical positions to be filled in the next three years.
>
> "This amendment would make it impossible for the Justice Department to obtain such decrees in the future." *Id.* at 1675, *1972 Leg. Hist.* at 1071.

The second amendment proposed by Senator Ervin sought to apply section 703(j) to the executive, thus, as Senator Javits noted, "[making] unlawful any affirmative action plan like the so-called Philadelphia Plan". *Id.* at 4918, *1972 Leg. Hist.* at 1715.

The Senate rejected both amendments by two-to-one margins. *Id.* at 1676, 4918, *1972 Leg. Hist.* at 1074-75, 1716-17.

A section-by-section analysis of the final version of H.R. 1746, the amending bill, submitted by the Conference Committee of the House and Senate, provides:

> "In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII."

1972 Leg. Hist. at 1844. While the 1964 legislative history was somewhat cloudy, the 1972 amendments to Title VII and section 706(g)[10] emphasize Congress's intention to allow the courts wide discretion in fashioning effective remedies, including numerical goals, for employment discrimination:

> "The provisions of this subsection [706(g)] are intended to give the courts wide discretion in exercising their equitable powers to fashion the most complete relief possible." *1972 Leg. Hist.* at 1848.

[10] Title VII was extended to cover public employees and section 706(g) was amended to include the italicized words:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay ..., or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission ..."

1972 Leg. Hist. at 1902.

Prior to the enactment of the 1972 amendments, numerical goals or other group relief had been ordered in at least nine Title VII cases,[11] including *Ironworkers Local 86*, *supra*, printed in the Congressional Record by Senator Javits. The courts had clearly decided that Title VII did not prohibit classwide numerical remedies. Thus, Congress's rejection of the Ervin amendment was an unambiguous endorsement of the judicial interpretation of the broad scope of section 706(g) remedial powers conferred by the 1964 Act, including the power to order classwide numerical relief. *See, e.g., United States v. International Union of Elevator Constructors, Local 5*, 538 F.2d 1012, 1019-20 (3d Cir. 1976); *EEOC v. AT&T*, *supra*, 556 F.2d at 177 ("[T]he solid rejection of the Ervin Amendment confirmed the prior understanding by Congress that an affirmative action quota remedy in favor of a class is permissible.").

The Department of Justice and the EEOC, initially and throughout the 1970s, consistently interpreted section 706(g) as providing the Federal courts wide discretion in formulating relief, including numerical remedies, for Title VII violations. *See, e.g.*, briefs submitted by the United States in *United States v. International Union of Elevator Constructors, Local Union No. 5*, *supra*; *EEOC v. AT&T*, *supra*. That interpretation should be accorded deference. *North Haven Board of Education v. Bell*, 456 U.S. 512, 522 n.12 (1982).

The Solicitor General's new "interpretation" is not entitled to any deference, however, because it is not contemporaneous

[11] *Kaiser v. McCarty, Inc.*, 1 Wage & Empl. Prac. Cas. (BNA) 197, 200 (E.D. La. 1967), *aff'd sub nom. Boot and Shoe Insulators v. Kaiser*, 417 F.2d 1047, 1054 (5th Cir. 1969); *United States v. Ironworkers Local 86*, *supra*, 315 F. Supp. at 1247-52; *United States v. Central Motor Lines, Inc.*, 325 F. Supp. 478, 479 (W.D. N.C. 1970); *Flores v. Richardson*, 4 Wage & Empl. Prac. Cas. (BNA) 299, 303 (W.D. Wash. 1971); *Buckner v. Goodyear Tire and Rubber Co.*, 339 F. Supp. 1108, 1124 (N.D. Ala. 1972), *aff'd*, 476 F.2d 1287 (5th Cir. 1973); *United States v. Wood, Wire & Metal Lathers International Union, Local 46*, 341 F. Supp. 694, 699 (S.D.N.Y. 1972), *aff'd*, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); *United States v. IBEW, Local 212*, 5 Wage & Empl. Prac. Cas. (BNA) 469, 470, 470 (S.D. Ohio 1972), *aff'd*, 472 F.2d 634 (6th Cir. 1973); *United States v. Bricklayers Local 1*, 5 Wage & Empl. Prac. Cas. (BNA) 863, 881-82 (W.D. Tenn. 1973); *Sims v. Sheet Metal Workers, Local 65*, 353 F. Supp. 22 (N.D. Ohio 1972), *aff'd*, 489 F.2d 1023 (6th Cir. 1973).

with the enactment of the statute or its amendment. *Cf. General Electric Co. v. Gilbert*, 429 U.S. 125, 140-41 (1976); *California Hospital Association v. Henning*, 770 F.2d 856, 859 (9th Cir. 1985).

III. FEDERAL COURTS HAVE AWARDED OR APPROVED NUMERICAL RELIEF ONLY AFTER A CAREFUL EXAMINATION OF THE NEED FOR THE RELIEF AND THE EFFECT SUCH RELIEF WOULD HAVE ON NONMINORITIES.

The Federal courts have taken great care in shaping relief to fit the specific situation presented. The courts have not lightly and freely imposed or approved affirmative numerical relief. Rather, the courts have limited and tailored affirmative relief to meet the specific needs of each case while taking care to limit and reduce the effects of such relief on nonminorities. There is no specific standard governing the imposition of numerical relief because the relief ordered in any particular Title VII case must be unique and individual to the specific facts of that case. Nevertheless, certain factors useful in assessing the advisability of affirmative relief have been developed.

The factors most commonly considered by courts were articulated by this Court in *Weber*, *supra*, 443 U.S. 193. This Court, while declining to "define in detail the line of demarcation between permissible and impermissible affirmative action plans", nevertheless examined the purpose and duration of Kaiser's affirmative action plan and its effect on third parties before determining that the "plan falls on the permissible side of the line." *Id.* at 208.

The courts' responsible use of discretion and careful adherence to this Court's guidance in *Weber* is exemplified by two cases in the Fifth Circuit. In *United States v. City of Alexandria*, 614 F.2d 1358 (5th Cir. 1980), the Fifth Circuit used the same factors that were discussed in *Weber* to review the nature the proposed settlement between the Department of Justice and the City of Alexandria, which the district court had declined to approve, because it contained affirmative hiring relief for women and blacks in the police and fire departments. *Id.* at

1361. The Fifth Circuit determined that the proposed consent decree was appropriate given the presence of severe statistical imbalances. The court noted that the goals were temporary, did not bar the advancement of white males and did not require defendants to consider unqualified women and blacks for vacancies. The court concluded that "the goals will thus serve to prevent those responsible for personnel decisions from automatically choosing a white male when there is a qualified black or female. This attempt to break down traditional patterns which foreclose opportunities to blacks and women was the motivation behind Title VII." *Id.* at 1366 (citations omitted).

Accordingly, the court reversed the district court's refusal to enter the consent decree and remanded, instructing the district court to enter the decree. *Id.* at 1367.

In *Williams v. City of New Orleans*, 543 F. Supp. 662 (E.D. La. 1982), the district court, after a four day fairness hearing, declined to approve the proposed consent decree unless the one-to-one promotion goal was deleted. The trial court determined that the goal exceeded the court's remedial objectives and seriously jeopardized the career interests of nonminorities. A three-judge panel of the court of appeals concluded that the trial court had abused its discretion in conditioning its approval of the proposed consent decree on the deletion of the promotion goal and remanded the case instructing the court to sign the decree. 694 F.2d 987 (5th Cir. 1982).

On rehearing *en banc*, the Fifth Circuit found that the district court, properly following the *Weber* guidelines, did not abuse its discretion in finding that the "one-to-one promotion ratio was overbroad and unreasonable in light of the severe and long-lasting effect on the rights of women, Hispanics and non-Hispanic whites." 729 F.2d 1554, 1561 (5th Cir. 1984) (*en banc*). The panel emphasized:

> "The ideal goal in this type case is to provide a suitable remedy for the group who has suffered, but at the least expense to others. . . . [W]e do not modify our previously expressed view that temporary hiring goals are ordinarily reasonable. . . . Title VII

> implicitly recognizes that there may be cases calling for one remedy and not another, and—owing to the structure of the federal judiciary—these choices are, of course, left in the first instance to the district courts." *Id.* at 1568 (citations omitted).

Those cases are neither an aberration nor a signal of a recent judicial shift. The history of judicially-imposed and judicially-approved affirmative relief in this country over the past two decades amply demonstrates judicial caution and selectivity.[12]

Similarly, the relief imposed in *Local 28* and approved in *Local 93* was carefully formulated and analyzed by the district courts and was scrutinized on review by the courts of appeal. In both cases the relief presently at issue before this Court was found to be necessary and appropriate relief in light of the facts of each case. In neither case did the courts find that the rights of nonminorities were unnecessarily trammeled.

---

[12] For example, in Guardians Association of the New York City Police Department, Inc. v. Civil Service Commission of the City of New York, 630 F.2d 79 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981), the Second Circuit reviewed the record and the district court's findings and determined that they were insufficient to support long-term or remote affirmative hiring goals but found that an interim one-to-one goal was permissible. In *United States v. City of Buffalo*, supra, 633 F.2d 643, the Second Circuit determined that the record did not support imposition of a long-term affirmative goal but approved as appropriate an interim affirmative hiring goal. In Stuart v. Roache, 720 F.2d 1209 (10th Cir. 1983), *cert. denied*, 105 S.Ct. 2357 (1985), the Tenth Circuit Court vacated the district court's imposition of numerical goals and timetables because "strict goals and timetables should not be imposed where alternative equally effective methods could . . . suppress merit to a quota." *Detroit Firefighters v. Barrow*, supra, 679 F.2d at 598; *United States v. City of Chicago*, supra, 549 F.2d at 437; *Talbert v. Bliss*, supra, 691 F.2d at 623. Numerical goals were imposed reluctantly by the trial courts in these cases after non-numerical relief proved ineffective. In each case the affirmative relief imposed was affirmed by the appellate court.

II. STATUTES ENACTED UNDER THE THIRTEENTH AMENDMENT MAY AUTHORIZE PROSPECTIVE RACE- AND GENDER-CONSCIOUS REMEDIES EVEN UNDER TITLE VII

We agree with the appellate courts that have uniformly rejected the government's argument and have held that Sheet Steel did not overrule, sub silentio, and in dictum, nearly twenty years of Title VII law without discussing or even acknowledging the competing public policies implicated in this issue and in the array of precedential decisions.

Petitioners and the Solicitor General have read too much into Sheet Steel. The courts of appeals have not interpreted the Sheet Steel decision as limiting the remedial arsenal of section 706(g) to make-whole relief for identifiable victims of discrimination.[1] Nor one has interpreted it as a ban to all classwide race-conscious remedies whether ordered after litigation or entered pursuant to a consent decree. Rather the courts view Sheet as the proper application of make-whole relief upon the facts of that case. We suggest this Court should agree.

[1] Peterson v. Hewlett-Packard Co., 358 F.3d 599, 606 (9th Cir. 2004); Bedford Cent. Sch. Dist. v. Diss, 334 F.3d 217, 230 (2d Cir. 2003); Bryant v. City of Jackson, 298 F.3d 507, 519 (5th Cir. 2002); Commonwealth of Pennsylvania v. Rendell, 247 Operating Engineers, 58 F.3d 1205, 1209 (7th Cir. 1995); Kromnick v. School District of Philadelphia, 739 F.2d 894, 901 (3d Cir. 1984), cert. denied, 469 U.S. 1217 (1985); Wygant v. Jackson Bd. of Education, 746 F.2d 1152, 1156 (6th Cir. 1984), cert. granted, 469 U.S. 1013 (1985); Compardo, supra, 733 F.2d at 1459; cert. granted, 106 S.Ct. 59 (1985); Kirkland v. New Blue v. Sherry, 730 F.2d 683, 690 (11th Cir. 1984); Boston v. School Committee, School Committee, 771 F.2d 744, 746 (1st Cir. 1985); Kromnick v. City of Madison, 730 F.2d 780, 783 (Fed. Cir. 1983), cert. denied, 469 U.S. 1206 (1984); Diaz v. American Telephone & Telegraph, 747 F.2d 1316, 1333 (9th Cir. 1984); Paradise v. Prescott, supra, 767 F.2d 1514; Kromnick v. Chi. supra, 778 F.2d 937.

CONCLUSION

The judgments of the courts of appeals in both Local 93 and Local 28 should be affirmed.

Respectfully submitted.

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February 24, 1986

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
JAN 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 84-1656 and 84-1999

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1985

LOCAL 28 OF THE SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, AND LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,
Petitioners

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et al.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, C.L.C.,
Petitioners

vs.

CITY OF CLEVELAND, et al.
AND
VANGUARDS OF CLEVELAND,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE CITY OF BIRMINGHAM, ALABAMA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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The City of Birmingham, Alabama submits this brief Amicus Curiae pursuant to United States Supreme Court Rule 36.4.

Interest of the Amicus Curiae

The City of Birmingham is unusually well qualified to assess the arguments presented in these consolidated cases. Birmingham's history in racial matters is regrettable and well known. Further, its awakening to its obligations of non-discrimination was brought about only through prodding by the federal government and by extensive litigation. Recently, however, Birmingham has made progress in changing both racial attitudes and stratified municipal employment patterns. This progress, in part, is attributed to the successful implementation of affirmative action goals in employment. Most importantly, the City of Birmingham has determined that its earlier grudging acceptance of affirmative action was misplaced pessimism. Through the growing representation of all segments of society in its municipal departments, those departments — especially fire and police — are better able to serve and protect all citizens of Birmingham in every neighborhood and community in the City.

Birmingham, like Cleveland, agreed in a conscientiously-constructed consent decree (hereinafter referred to as "Birmingham Decree" and "Cleveland Decree," respectively) to race and gender-conscious affirmative action designed to remedy the pernicious effects of past discrimination against blacks and women. Like the Cleveland Decree, the Birmingham Decree has been challenged by white municipal employees who, to a degree, are the certain beneficiaries of the City's past discriminatory policies. Unlike the Cleveland action, however, where all plaintiffs are private parties, the Birmingham litigation that resulted in the adoption of the Birmingham Decree was brought by the United States as well as by private parties. Moreover, the Justice Department took the lead in forging the goal remedies in the Birmingham Decree. Despite this earlier role, however, the United States now is an aggressive advocate

on reverse-discrimination litigation ordinarily attacking employment decisions required by the very decree in controversy.

In 1974, several blacks and an area NAACP chapter brought employment discrimination lawsuits against the Jefferson County Personnel Board (the local civil service system) and the City of Birmingham under Title VII of the Civil Rights Act of 1964, as amended. Subsequently, the Department of Justice also filed a Title VII pattern and practice action against the City, other municipalities, and other governmental entities, charging them with pervasive race and sex discrimination in employment. The cases were consolidated in federal district court in Birmingham. Over the course of approximately seven years, some issues -- involving applicant testing for entry level police and fire jobs -- were tried to conclusion; other issues were extensively prepared for litigation.

Prior to settlement of the actions, some of the issues pertaining to municipal employment were litigated in two separate trials. In 1977, the trial court ruled that tests used to screen and rank applicants for employment as police officers and firefighters discriminated against blacks. That decision was affirmed on appeal. *Ensley Branch of the N.A.A.C.P. v. Seibels*, 616 F.2d 812 (5th Cir.), *cert. denied*, 449 U.S. 1061 (1980). In a second trial in 1979, other employment tests, qualifications and practices were challenged. Finally, with the active participation of the Department of Justice, all parties -- the City, the Department of Justice, and the private plaintiffs -- entered into negotiations to settle the lawsuits. Prior to an announcement of the decision of the 1979 trial, negotiations yielded a Court-approved consent decree, signed by the private plaintiffs, by the City of Birmingham, and by the Department of Justice, which became effective on August 21, 1981.

As its lynchpin, the Birmingham Decree includes an affirmative action program whose long-term goal was to achieve a municipal work force whose percentages of whites, blacks and women were in reasonable proportion to the percentages of those groups in the labor force of Jefferson County. The decree also provides interim goals that encouraged the City to

hire and promote qualified blacks and women, where available, to City jobs at rates that range from fifteen percent (15%) to thirty percent (30%) annually for women and that range from thirty-three percent (33%) to fifty percent (50%) annually for blacks. For the past four years, the City has complied with the consent decree goals to the extent that persons qualified for hiring or promotion were available. Because the Birmingham Decree had goals -- and not quotas -- the City was never compelled to hire any particular individual who was not qualified for his or her position.

Moreover, the Birmingham Decree contained a provision to "immunize" the City from liability in subsequent discrimination claims brought by passed-over employees for the City's failure, *inter alia*, to promote an employee pursuant to the affirmative action goals. That provision, in paragraph 2, stated: "Nothing herein shall be interpreted as requiring the City to hire unnecessary personnel, or to hire, transfer, or promote a person who is not qualified, or to hire, transfer, or promote a less-qualified person, in preference to a person who is demonstrably better qualified based upon the results of a job-related selection procedure." (emphasis added). This provision allowed the City the flexibility to decline to hire or promote an individual, even though that individual might otherwise be a candidate for hire or promotion under the Birmingham Decree.

Finally, paragraph 3 of the Birmingham Decree provided that "the parties hereto agree that they shall individually and jointly defend the lawfulness of such remedial measures in the event of challenge by any other party to this litigation, or by any other person or party who may seek to challenge such remedial measures through intervention or collateral attack." In short, the City understood that the consent decree provided redress for past discrimination, protected the municipal treasury from potentially catastrophic liability, allowed the City to maintain qualified employees consistent with the local civil service law, and required all parties to defend the decree so that, among other things, the City would not have to expend taxpayer dollars on legal fees for the defense of employment

discrimination lawsuits. After seven years of litigation, the City hoped to put these tax dollars to constructive use.

In 1994 (ten years after the first suit against Birmingham had been brought and three years after that litigation was settled by entry of consent decree), Birmingham was sued for alleged reverse discrimination by whites who charged that the Birmingham Decree, and Birmingham's implementation of that decree, unlawfully deprived them of employment opportunities. Much to the surprise of Birmingham, the Justice Department intervened in vigorous support of the white individuals and challenged the City's implementation of the Birmingham Decree. In December of 1995, after a full trial in two consolidated actions pertaining to two of the City's departments, the district court rejected the claims of reverse discrimination, finding, *inter alia*, that although Birmingham considered race and sex in promotions, it did so pursuant to a valid consent decree. *In re Birmingham Reverse Discrimination Employment Litigation*, CV-94-P-0985-S (N.D.Ala. Dec. 20, 1995). In upholding the lawfulness of the consent decree, the district court followed the Eleventh Circuit Court of Appeals' precedent which upholds race-conscious remedies that benefit persons not shown to be victims of discrimination, when the remedies are not imposed under circumstances that existed in *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984), and otherwise comport with the guidance provided in *United Steelworkers v. Weber*, 443 U.S. 193 (1979). *Paradise v. Prescott*, 767 F.2d 1514 (11th Cir. 1985).

The results of the hiring and promotion goals in the Birmingham Decree are clear. The City of Birmingham is finally beginning to have a municipal work force, particularly a police force and fire department, that reflects Birmingham's multiracial community. This reflection of Birmingham's pluralism gives municipal departments a much needed familiarity with the customs, standards and experiences that exist in the various communities in Birmingham, and allows the City of Birmingham to provide the quality of services that are necessary to serve the entire community. For example, the Birmingham Police

Department currently has almost one and a half times more blacks employed than at the time of the entry of the Decree. The number of black police sergeants has increased from three in 1981 to twenty-four in 1996. The number of black police lieutenants has increased from zero to three. The number of black police captains has increased from zero to one (promoted in 1995).

In the Birmingham Fire & Rescue Service, the number of blacks has almost doubled since the signing of the decree. In the officer ranks of the Birmingham Fire Department, there are now thirteen lieutenants and one captain who are black. At the time of the decree, there were no blacks employed above the entry level rank of firefighter.

The twenty percent (20%) black representation in the Birmingham Police Department and the twelve percent (12%) black representation in the Birmingham Fire & Rescue Service remain modest percentages for a city whose population exceeds fifty percent (50%) black. But even these small fair employment advances are almost entirely attributable to the employment goals and timetables which the Birmingham Decree directs the City of Birmingham to follow.

The issues in these consolidated cases are, therefore, of vital interest to the City of Birmingham for a variety of reasons. First, this Court's ruling may affect any appeal taken in the Birmingham Reverse Discrimination Litigation, as well as affect the outcome of three other reverse discrimination actions resulting from the consent decree promotions now pending against the City of Birmingham. Second, this Court's ruling will determine whether the Birmingham Decree, signed by Birmingham with the intent of putting behind it the many years of discriminatory employment practices, of rectifying the consequences of those practices, and of ending interminable litigation, will in fact have those intended effects. Third, this Court's ruling will send a much-needed message to the lower courts and to all potential litigants by clarifying and reinforcing the continued viability of affirmative action incorporated in court decrees.

Birmingham's recent experience litigating reverse discrimination claims brought by white plaintiffs and by the Department of Justice compels the City to indicate to this Court that the arguments presented in the briefs of the United States and the Equal Employment Opportunity Commission reflect a political bias that is contrary to the long-held positions of these entities and that does not represent Congressional intent. The City of Birmingham has been betrayed not only by a Justice Department whose philosophy has changed over the past five years, but by a Justice Department that consistently refused to abide by its self-imposed and court-approved obligations in the Birmingham Decree.

In the *Birmingham Reverse Discrimination Litigation*, the Justice Department presented arguments that were ambiguous, perplexing, and at times, directly contrary to arguments that it had earlier presented in the original Birmingham Decree litigation. Accordingly, the arguments of the EEOC (presented on its behalf by the Department of Justice in *Sheet Metal Workers*, No. 84-1636) are not due the deference normally accorded interpretations by governmental bodies of statutes they administer and enforce. *Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 n. 4 (1977); *General Electric Co. v. Gilbert*, 429 U.S. 125, 143 (1976). The similar arguments of the United States, *Amicus Curiae* in *Vanguards of Cleveland*, No. 84-1999 (also presented by the Department of Justice), are not only entitled to no deference, but are patently suspect inasmuch as they represent complete abandonment of the positions historically advanced by the Department.

SUMMARY OF THE ARGUMENT

The United States Department of Justice had for years advocated and obtained court-ordered race-conscious and gender-conscious remedies in employment discrimination litigation. The Department sought, authored and obtained such a decree in litigation with *Amicus*, the City of Birmingham, as well as with other jurisdictions and private employers across the country. The Department has consistently contended in these actions that such remedies are lawful as well as necessary to effectuate the purposes of Title VII.

The government made the same arguments in support of the lawfulness and need for minority-conscious goals to this Honorable Court when the case of *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), was before this Court. In defending the lawfulness of such remedies, the government expressly contended that goals may benefit an entire class, some of whose members were victims of discrimination, without being limited solely to the actual victims.

The government's historical position in support of the very kinds of goals contained in the decrees now before this Court, not its recent abandonment of that position, is entitled to considerable deference. *Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 n. 4 (1977). Indeed, the historical position is the legally correct position.

Race and gender conscious remedies are necessary to effectuate the goals of Title VII. Such remedies are not unfair to non-minorities even if they benefit individuals not shown to have been victims of discrimination. Guidance provided by this Court in its previous decisions, including in *Weber*, *supra*, assures that non-minorities do not unfairly bear the burdens of the affirmative action goals because such goals are approved or imposed by the lower courts only after considering the need for the goals, their impact on non-minorities, and other relevant factors.

The experience of the *Amicus* demonstrates that the goals contained in its consent decree were necessary to achieve meaningful employment opportunities for minorities in Birmingham, Alabama. *Amicus'* experience has also demonstrated that this achievement has not occurred at the expense of non-minorities. Finally, the experience of *Amicus* demonstrates the crucial need for an employer, particularly a municipal employer with scarce funds, to be able to settle employment discrimination litigation on a basis that is fair to its employees, minorities and non-minorities alike, and also on a basis that relieves the

employer of being forced to participate in protracted and expensive litigation. The consent decree signed by *Amicus* and by the City of Cleveland are such decrees and, along with the decree imposed upon the Sheet Metal Workers after litigation, are authorized by Title VII.

ARGUMENT

I. The United States Department of Justice Had For Years Advocated Court-Ordered Race-Conscious Remedies As Lawful and Necessary

A. *The United States Advocated and Obtained Race-Conscious Remedies in Litigation with Birmingham and Other Jurisdictions Across the Country*

The Department of Justice sought, authored and obtained in Birmingham's litigation a consent decree containing race and gender-conscious aspects which are similar to provisions of decrees before this Court which are being attacked.

The Birmingham Decree contains gender specific hiring and promotion goals that permit, and indeed compel, Birmingham to hire and promote qualified minorities in preference to qualified non-minorities. For example, the interim relief provided in the Birmingham Decree requires the City to fill 50% of certain vacancies in the police and fire departments with blacks who are qualified and are available for promotion and to promote qualified blacks to subsequent vacancies in higher level positions at twice the percentage of blacks in the positions from which promotions are traditionally made.[1] While the decree does not compel Birmingham to hire or promote an unqualified or less qualified minority in preference to a person who is "demonstrably better qualified based on the results of a job related selection procedure,"[2] it does not otherwise permit Bir-

[1]Other similar percentages and ratios are prescribed for female promotions and for blacks and females hired into entry-level jobs.

[2]Paragraph 2 of the decree reads, in pertinent part: "Nothing shall be interpreted as requiring the City to hire unnecessary personnel, or to hire, transfer or promote a person who is not qualified, or to hire, transfer

mingham to prefer a qualified non-minority over a qualified, but arguably less qualified, minority if doing so would prevent Birmingham from meeting prescribed hiring or promotional ratios. The decree, therefore, contemplates that in some instances, minorities who have not been found to be actual victims of past discrimination will be preferred over whites.

At the hearing held in 1981 to determine the fairness of the proposed Birmingham Decree, this matter was directly addressed when the decree was explained as requiring preferential treatment of qualified minorities over more qualified non-minorities, without any condition that the less qualified minorities be actual victims.[3] The government unequivocably represented this feature of the decree to be lawful.[4] When the decree was challenged in Court by white employees of the City Engineering Department, the Justice Department filed, on October 12, 1982, a motion to dismiss the challenge or alternatively a motion for summary judgment in favor of the City of Birmingham and other defendants. The Justice Department maintained that the white plaintiffs' action "constitute[d] an impermissible collateral attack on the lawfully entered Consent Decrees" entered into by the United States and the City of Birmingham and the Jefferson County Personnel Board. United States' Motion to Dismiss or Alternatively Motion for Summary

or promote a less qualified person, in preference to a person who is demonstrably better qualified based upon the results of a job related selection procedure."

[3]In response to the district court's question of how Birmingham would choose between qualified blacks and whites, the City responded:

> Assuming that both the whites and blacks were both qualified, but assuming . . . the whites were perceived to be better, if the blacks were perceived minimally qualified, and we required additional blacks to meet our goals, then we would take them.

August 3, 1981 Hearing at 63, *United States v. Jefferson County*, No. 75-P-0666-S (N.D. Ala. Aug. 21, 1981), *aff'd*, 720 F.2d 1511 (11th Cir. 1984). The government did not differ from that view.

[4]The Justice Department's representative stated: "We believe to the extent that the two decrees contain affirmative hiring goals and promotion goals for blacks and women, that those goals are lawful that they do not unlawfully discriminate against whites." *Id.* at 60.

Judgment, *Birmingham Association of City Employees v. Arrington*, No. CV-82-P-1852-S (N.D. Ala. filed Oct. 12, 1982) (later consolidated with other actions, *In re Birmingham Reverse Discrimination Employment Litigation*, *supra*).

Two years later, however, the Justice Department made known its intention to enter a reverse discrimination lawsuit against the City of Birmingham as a party plaintiff, thereby aligning itself with white private plaintiffs who were challenging the modest promotions made pursuant to the affirmative action goals of the Birmingham Decree. Paradoxically, however, despite its stated intention to intervene as a party plaintiff and contest promotions made pursuant to the decree's goals, the Justice Department also vowed that the United States plans "vigorously to defend the validity of those Consent Decrees and to defend the validity of any remedial measures required by those Consent Decrees." Hearing at 29 *Welks v. Arrington*, No. CV-83-AR-2116-S and *Zannis v. Arrington*, No. CV-83-AR-2480-S (N.D. Ala. Feb. 28, 1984) (later consolidated with other actions, *In re Birmingham Reverse Discrimination Employment Litigation*, *supra*). The City of Birmingham continues to be perplexed by the Justice Department's contradictions.

On May 4, 1984, the Justice Department filed a brief in the Birmingham reverse discrimination case that presented a most disingenuous interpretation of the goals provided in the consent decree. The brief stated that the goals and preferences as to race and sex in hiring and promotion take race into account only in "tie-breaker situations," that is, when two candidates in every respect are equally well qualified. Memorandum of the United States In Response to Motions of Defendants Arrington and City of Birmingham and the Defendant-Intervenors at 12-13, *In re Birmingham Reverse Discrimination Employment Litigation*, *supra*, (filed May 4, 1984). The Justice Department advocated that theory in a hearing on July 3, 1985, when it argued that "the decree would contemplate a tie-breaker use of race, but that would be it. . . ." July 3, 1985 Hearing at 14, *In re Birmingham Reverse Discrimination Employment Litigation*, *supra*.

After hearing of the tie-breaker theory of the consent decree, the district court summarily rejected the government's contention and reminded the Justice Department that the words of the decree contain much broader mandates. May 14, 1984 Hearing at 23, *In re Birmingham Reverse Discrimination Employment Litigation*. Yet, despite the Justice Department's attempt to disavow the unambiguous text and only logical meaning of the decree it had devised, and despite the United States' entry as a party plaintiff in the reverse discrimination action, the Justice Department advised the district court that "the United States has every intention of vigorously defending the validity of the Decree and of all the relief required by the Decree" and that "we have not taken one false step from that commitment. . . ." The district court replied: "That is a matter that obviously is debatable." *Id.* at 38.

The only arguable justification for the Justice Department's attack on the consent decree in the hearing of February 1984, the motion of March 1984, the May 1984 brief and the May 1984 hearing would be that the Justice Department's failure to defend the decree was justified by *Stotts*. Yet, this Court did not render its decision in *Stotts* until June 12, 1984, months after the Department's about-face. Moreover, none of the courts of appeal prior to *Stotts* had rendered any decisions that in any way could have impugned the validity of the Birmingham Decree's race and gender conscious goals, and none of the courts of appeal since *Stotts* has construed *Stotts* to invalidate such goals in consent decrees or even in litigated matters where the goals do not abrogate *bona fide* seniority systems.

The Justice Department's narrow and facile interpretation of the Birmingham Decree eviscerates the decree, as there are rarely, and perhaps never, occasions to select between *equally* qualified candidates and, if the occasion should arise, it would be so rare as to have no meaningful impact on minority workforce representation. The conclusion is inescapable that the government's present interpretation of the Birmingham Decree has evolved by way of hindsight to be consistent with the government's newspeak view of affirmative action.

Even now, after years of litigation, after a trial, and after a judgment for the City of Birmingham, the City remains confused by the Justice Department's interpretation of paragraph 3 of the Birmingham Decree, which requires the Department to defend the decree against collateral attack. The Department's contradictory intervention on behalf of white plaintiffs coupled with its cynical vow to defend the decree according to the dictates of paragraph 3 still astonish the City of Birmingham. The present view is a repudiation of and consequently an abdication of the government's long-time role in securing compliance with Title VII through goals and timetables. While this new governmental policy first surfaced in the Birmingham action prior to the *Stotts* decision, the government obviously has embraced *Stotts* as a justification for its actions in attempting to dismantle the carefully-wrought Birmingham Decree as well as dozens of similar decrees previously sought, promoted and signed by the government.[5] The government's broad interpretation of *Stotts* is unjustified. It does not represent a colorable reconsideration of statutory construction or of the intent of Congress when Title VII was enacted, but rather represents nothing more than the political rhetoric and apology of the current Justice Department.

This hidden agenda of the government -- its plan to persuade courts to adopt as law the Department's abdication of affirmative action -- is not immediately apparent from the government's briefs in these pending cases, but is abundantly clear from actions taken by the government in the Birmingham Reverse Discrimination Litigation. In the Birmingham cases, the government advocated and obtained the imposition of gender and race-conscious goals, remedies considered by all parties and the court as plainly lawful, and vowed to defend the decree

[5]The Justice Department has invited some 31 jurisdictions across the country, which are subject to decrees containing race and/or gender conscious goals, to join the Department in seeking to reopen the decrees and to eliminate the minority-conscious goals. Hearing on the Nomination of William Bradford Reynolds to be Associate Attorney General, 99th Cong., 1st Sess. 91-92 (June 4, 1985).

against collateral attack. Later, with a change in leadership in the Justice Department, the government led the attack on the decree by proffering a narrow construction of the Birmingham Decree that was plainly contrary to its express wording and contrary to the parties' intentions. Moreover, the government's narrow interpretation could not be justified as necessary to render the decree lawful except under a very broad reading of *Stotts*. No court of appeals, however, has yet interpreted *Stotts* so broadly as would be necessary to invalidate the Birmingham Decree or the decrees now being challenged by petitioners in these two consolidated actions.

In inviting this Court to accept its narrow view of permissible remedies under Title VII and the United States Constitution, the government implicitly suggests that its present interpretation of the Constitution and of Congressional intent is the Department's long-standing interpretation. However, for years (and as recently as August 1981 when the Birmingham Decree was entered), the Justice Department actively sought, obtained and defended the very remedies it now contends are unlawful.

The Birmingham litigation is just one of dozens of similar actions across the country in which the government obtained race-conscious remedies of the kind imposed in the cases now before this Court. Indeed, the Civil Rights Commission in 1972 credited the Civil Rights Division of the Justice Department for having brought or participated as the Amicus in the cases resulting in "the landmark decisions sustaining the use of numerical goals and timetables as a remedy for past discrimination." 1972 Civil Rights Commission Report 277 n. 76. *See, e.g., United States v. Local 86, Ironmakers*, 443 F.2d 544, 553 (9th Cir. 1971). This historical role of the government reflects the statutory interpretation that warrants the deference normally accorded a governmental agency charged with the statute's enforcement. *Sutty, supra*, 434 U.S. at 142 n. 4.

B. *The United States Advocated Race-Conscious Remedies As Lawful and Necessary Before This Honorable Court*

Just as the United States, by way of hindsight, developed a constrained interpretation of the Birmingham Decree which differed from the government's interpretation at the time of signing, the United States has recently developed and is now proposing to this Court a view of Title VII and of Congressional intent that differs from the position it previously took in this Court.

In its brief before this Court in *United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979), the government went to great lengths to explain that race-conscious remedies are lawful and necessary. While *Weber* involved a voluntary affirmative action plan, as opposed to one imposed by a court or with a court's approval, the government in *Weber* did not confine its defense of affirmative action to such voluntary plans. In 1979 the government represented to this Court:

> Yet while the court of appeals acknowledged that an employer can lawfully take race-conscious action to remedy its prior discrimination, the court held that such action is permissible only in very limited circumstances: to justify the race-conscious action, according to the court of appeals, the employer must prove that it engaged in discrimination, and its remedial action must be limited to benefiting the particular victims of its discriminatory conduct. *In our view, this standard is too narrow.*

Brief for the United States and the Equal Employment Opportunity Commission in *United Steelworkers of America v. Weber*, (Jan. 30, 1979) (hereinafter "U.S.A./E.E.O.C. *Weber* brief") at 16-17. (Emphasis added).

Because Kaiser's affirmative action plan was not implemented pursuant to a court decree, this Court in *Weber* did not address whether the affirmative action plan which it held to be lawful could have been lawfully imposed by a court. Petitioners' argument that Section 703(g) of Title VII would prevent a court from implementing a *Weber*-type affirmative

action plan is contrary to the government's position in *Weber*. There the government argued:

> A court could have imposed such a remedy [as was adopted by Kaiser] if, after litigation, it had found that Kaiser had discriminated against blacks. The legislative history of Title VII establishes that numerical race-conscious measures, such as the Gramercy training programs, were contemplated as appropriate relief for courts to grant if they were necessary to remedy proven discrimination. And even without an admission or finding of discrimination, the same program could have been incorporated into a consent decree in settlement of litigation.

U.S.A./E.E.O.C. *Weber* brief at 18-19.

Noting that consent decrees "commonly contain affirmative action obligations, including goals and timetables" and that the validity of such decrees is "not undermined by disclaimers of past discrimination," the government insisted in its *Weber* brief that affirmative action — whether court-imposed or otherwise — need not be confined to proven victims of discrimination:

> [A]s in the case of settlement agreements and consent decrees, the court should not insist on clear proof of a violation by the employer against the particular persons benefited by the affirmative action program.
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> It is true . . . that the blacks selected for the training programs had not been identified as victims of prior discrimination. . . . But . . . class-wide numerical relief need not always be limited to identifiable victims.

U.S.A./E.E.O.C. *Weber* brief at 40, 52.

In 1979, the government understood Title VII's legislative history as permitting race-conscious goals and Section 706(g) as not intended to prohibit such remedies. The government explained that the concern raised by *some* Congressmen that the Act would require the use of quota systems led to assurances by the Act's sponsors that the Act did not require employers to maintain racially balanced work forces. These assurances, how-

ever, "did not suggest restrictions on remedies that could be ordered after a finding of discrimination." U.S.A./E.E.O.C. *Weber* brief at 29. Rather, Congress intended to preserve management prerogatives to the fullest extent possible, *in the absence of discrimination*. As explained by the government in 1979, "the last sentence of Section 706(g) simply stated that a court could not order relief under the authority of the Act if employers took action against employees or applicants on grounds other than those prohibited by the Act" and "did not in any way restrict the scope of the remedies [such as race-conscious numerical goals] that could be ordered for the kinds of discrimination prohibited by the Act." U.S.A./E.E.O.C. *Weber* brief at 30-31.

The government's extensive review of the legislative history of the 1972 amendments to Title VII led it to conclude, in 1979, that "[a]ny doubts that Title VII authorized the use of race-conscious remedies were put to rest with the enactment of the Equal Employment Opportunity Act of 1972. . . ." U.S.A./E.E.O.C. *Weber* brief at 31. As noted by the government, Congress in 1972 was aware of the numerous court decisions ordering or upholding numerical relief as a remedy for violations of Title VII, and expressly stated its intent, in the Act's section-by-section analysis, to continue that case law. U.S.A./E.E.O.C. *Weber* brief at 32-33, 34 n. 17 (citing such cases in 5th, 7th, 8th and 9th circuits and citing S. Rep. No. 92-415, 92d Cong., 1st Sess. at 21, 27-28 (1971); H.R. Rep. No. 92-238, 92d Cong., 1st Sess. at 8, 13 (1971); 118 Cong. Rec. 1664-1676, 7166 (1972)).

Senator Javits opposed a proposed amendment to restrict federal agencies from ordering the use of numerical ratios in hiring, arguing that such a restriction "would deprive the courts of the opportunity to order affirmative action under Title VII . . . in order to correct a history of unjust and illegal discrimination . . ." and "would torpedo orders of courts seeking to correct a history of unjust discrimination . . . because it would prevent the court from ordering specific measures which would assign specific percentages of minorities that had to be

hired. . . ." *Id.* at 1665, 1667, cited in U.S.A./E.E.O.C. *Weber* brief at 33-34. The government further noted that the other co-floor leader, Senator Williams, also opposed any prohibition of numerical relief because such a prohibition "would strip Title VII . . . of all its basic fiber." 118 Cong. Rec. 1676 (cited in U.S.A./E.E.O.C. *Weber* brief at 34).

According to the government, these views "prevailed in the Senate" and "were shared by the House, where the committee that reported out the bill wrote:

> 'Affirmative action is relevant not only to enforcement of Executive Order 11246 but is equally essential for more effective enforcement of Title VII in remedying employment discrimination'."

U.S.A./E.E.O.C. *Weber* brief at 31, quoting H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 16 (1971).

Thus the government concluded in 1979:

> In light of Congress's keen awareness of the kinds of remedies courts had been granting in Title VII cases, and in light of the protests from Senator Ervin and others over the use of race-conscious remedies, this amendment to Section 706(g) provides substantial support for the proposition that Congress intended that numerical, race-conscious relief is available under Title VII to remedy employment discrimination.

U.S.A./E.E.O.C. *Weber* brief at 35.

We recognize that this Court's principal opinion in *Stotts* was influenced to some extent by statements in the Congressional Record which, at first blush, seem at variance with the government's analysis of legislative history in its *Weber* brief. *Stotts*, 104 S. Ct. 2576, ____, 81 L.Ed.2d 483, 500-01. Considering that this Court in *Stotts* was reviewing racial distinctions in layoffs imposed over the opposition of a party and in contravention of a collectively-bargained *bona fide* seniority system, the Court's review of legislative history was made with such facts in mind. This Court's statements in *Stotts* about Congressional intent should be considered in the context of the

intent under consideration — *i.e.*, Congress' intent to permit or prohibit a court-ordered racial quota over a party's objection when the quota overrides non-minority seniority rights in preference to minorities who are not proven victims of discrimination. Since this Court in *Stotts* was not attempting to discern Congressional intent with respect to racial quotas consented to by the parties or imposed pursuant to findings of discrimination, nor was it discerning Congressional intent with respect to racial quotas which do not abridge rights in a *bona fide* seniority system devoid of intentional discrimination, we invite this Court to reconsider legislative history in light of the facts presented by the cases now before it. We especially invite the Court to review the analysis of legislative history in the government's 1979 *Weber* brief, made much closer in time to the history under consideration and at a time when the government was still advocating the use of employment goals as necessary and lawful remedies without regard to whether they benefit actual victims of discrimination. The legislative history does not disclose an *intent of Congress* (in contrast perhaps to intent of some individual Congressmen) to prohibit race-conscious remedies of the kind imposed by consent decree upon the cities of Birmingham and Cleveland or imposed by the court upon Local 28 of the Sheet Metal Workers.[8]

The government's long-standing construction of Title VII as permitting a court to impose race-conscious remedies, evidenced by its securing such relief in countless actions, including Birmingham's litigation, and by its brief in *Weber*, is entitled to considerable deference. The government's recently-contrived construction of legislative history and its misreading of *Stotts* is nothing more than a retrenchment motivated by policies (adopted prior to *Stotts* and without regard to the existing case law) that are at odds with the purpose and intent of Title VII.

[8] Of course, the Fourteenth Amendment provides an additional and independent basis for race-conscious relief in suits against municipalities such as Cleveland and Birmingham, although it was not an available basis for relief in *Stotts*. Congressional intent with respect to Section 706(g) is irrelevant to remedies available in such actions. *Paradise v. Prescott*, 767 F.2d 1514, 1529 (11th Cir. 1985).

Unless this Honorable Court clarifies its holding in *Stotts* by limiting it to the facts of that case, reaffirms its approval of affirmative action as approved in *Weber*, and explicitly approves the actions of its lower courts in imposing race-conscious remedies where necessary to remedy past discrimination, it will send a fateful message to the government and to individuals who are, or may be, subject to discrimination. That message will sound the death knell of Title VII in all but the most narrow of circumstances, as it would encourage the government to undo all progress gained through years of vigorous enforcement of Title VII.

II. Race-Conscious Remedies Are Appropriate, Without Regard to Proof of Discrimination Against Each Beneficiary of the Remedies, as They Are Necessary to Effectuate the Goals of Title VII and Are Not Unfair to Individuals Not Benefited By Them

A. *Race-Conscious Remedies That Are Not Victim-Specific Are Necessary To Effectuate Title VII's Goals*

The mandate for race-conscious remedies can be demonstrated by Birmingham's employment history before and after entry of its consent decree. As of January 1, 1966, Birmingham had a total of 9 black employees out of a total of 1,689 employees in its classified services, which consists of higher paying jobs. On the other hand, the unclassified service, which consists primarily of casual laborers, was predominantly black.

In January, 1975, the year the Justice Department sued Birmingham for employment discrimination, the City had only 155 black classified employees out of a total classified workforce of 2,223 persons. The unclassified service remained predominantly black.

Employment discrimination was clearly evident in hiring black police officers and firefighters. It was not until 1966 that Birmingham hired its first black police officer. Ten years later, after the City was sued for employment discrimination by the Justice Department, only 28, or 5%, of the sworn officers were black. There were two black sergeants. No black had a rank above sergeant. Hearing on the Nomination of William Bradford Reynolds to be Associate Attorney General, 99th Cong., 1st Sess. (June 5, 1985) (Statement of W. Gordon Graham, Personnel Officer, City of Birmingham). The City's first black firefighter was not hired until 1968. In 1966, only 13, or 2.1%, of the firefighters were black.

In July, 1981, just before entry of the Birmingham Decree, the effects of past discrimination against blacks persisted in Birmingham's police and fire departments – notwithstanding the district court's race-conscious order in 1977 requiring consideration (but not otherwise requiring *selection*) of more blacks in these departments, and despite Birmingham's adoption of *voluntary* affirmative action plans. *United States v. Jefferson County*, No. 75-P-0666-S (Aug. 21, 1981), *aff'd* 720 F.2d 1511 (11th Cir. 1984). As of July 21, 1981, 79 of Birmingham's 480 police officers were black, 3 of its 131 police sergeants were black, and none of its 40 police lieutenants and captains was black. In the fire department, 42 of the 453 firefighters were black, and none of the 140 lieutenants, captains and batallion chiefs was black. *Id.*

Similarly disproportionate statistics existed with respect to employment of females in the same departments, where for many years positions were restricted to males. *Id.* at 8.

Clearly, the mere elimination of the long-standing barriers to employment of blacks and females – something that had already been accomplished before entry of the Birmingham Decree – was inadequate to remedy the effects of such pervasive historical discrimination. Since entry of the decree in 1981, opportunities for blacks and females have been enhanced, though not at the expense of qualified white males. In the four years after entry of the decree, Birmingham hired 130

police officers of which 67 were white and 63 were black; 92 were male and 38 female. There were 50 police sergeant promotions – 27 white and 23 black; 38 male and 12 female. Of 10 lieutenant promotions, 7 were white and 3 black; 9 were male and 1 was female. In the Fire and Rescue Service, Birmingham hired 85 firefighters of which 47 were white and 38 black; 82 were male and 3 female (prior to the Birmingham Decree no females had been employed). In this period, mid-1981 to mid-1985, there were 29 fire lieutenant promotions, 17 white and 12 black. Of the 10 captain promotions, 9 were black and 1 white.

Absent the consent decree, this modest progress would not have been made. It is the only mechanism available to the City to assure equal employment opportunity.[7] Yet, without the consent decree, Birmingham would be subject to new charges of race and sex discrimination, especially given the nature of an archaic civil service system, which has become a powerful lobby for the status quo.

It is equally apparent that the race-conscious remedies imposed by consent decree upon the City of Cleveland and by court order on the Sheet Metal Workers were necessary and appropriate remedies to overcome the effects of past discrimination. Although *de jure* segregation in Cleveland's municipal employment was halted before it ceased in Birmingham, the *de facto* segregation in Cleveland's police and fire departments was historically well-entrenched prior to the entry of the Cleveland Decree. Department custom and practice effectively prevented blacks from joining or advancing within municipal em-

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[7]This is particularly true since the civil service system under which Birmingham operates places the responsibility for testing and identifying qualified candidates with an independent entity, the Jefferson County Personnel Board, which is subject to a separate consent decree entered contemporaneously with Birmingham's decree. Without the race-conscious remedies in the Board's decree, namely the requirement that candidate certifications include sufficient numbers of minorities to enable Birmingham to meet its goals, Birmingham would have no mechanism – as none is provided under state law – to assure that minorities are even considered for a given job.

ployment. Through the Cleveland Decree, however, the City of Cleveland, like the City of Birmingham, has made progress in providing equal employment.

Any claims that race-conscious remedies other than those which benefit actual victims of discrimination are not necessary and would not frustrate settlement of Title VII actions ignore reality. The United States suggests that parties may

> agree on a formula for identifying class members who have been injured and for determining the degree of their injury. . . . If the formula is simple and mechanical, the parties will have no trouble applying it themselves. *Even if the formula is complex or requires judgments about the facts relating to individual claims*, the parties may still be able to settle the case without outside assistance if their counsel are able to develop a cooperative relationship. . . . . . [t]he parties may identify those entitled to relief by assessing the nature and effect of the allegedly discriminatory practices and applying that assessment to the facts of the individual cases. This process would involve establishing criteria for determining whether a member of the affected class would have received the relevant employment benefit absent the challenged practices.

Brief of the United States as *Amicus Curiae* in 84-1999 at 29, 30. (Emphasis added).

The United States' "formula" approach is both self-contradictory and unworkable. The government first suggests that parties may settle a Title VII action without making "judgments about the facts relating to individual claims." Yet, how can such judgments be avoided if the parties must determine "whether any member of the class would have received the employment benefit" absent discrimination? Once the criteria for the formula are determined, each individual case would necessarily require examination to determine the presence of each criterion. Unless a formula includes criteria such as the individual's qualifications, as well as his relative qualifications as compared to all other persons (minorities and non-minorities alike) who received or *might* have received the job in question, any formula that attempts to determine "whether a member of the affected class would have received the relative employment benefit" could not possibly accomplish its stated purpose. If any lesser formula is acceptable, then so should be the race-conscious remedies in the cases now before this Court, as neither assures that the remedy is victim-specific. To assure victim-specificity, the parties cannot avoid considering whether the individual was qualified for a job as well as more qualified than other individuals who would have been considered for the job, absent discrimination.

Evaluation of relative qualifications automatically converts a "settlement" into a series of mini-trials over individual claims, at which not only would the merits of the individual's claim be tried but, most assuredly, claims of intervening "affected" employees. In the case of a municipality or other large employer, especially where the discrimination pervades all aspects of employment, including recruitment, hiring and promotions, the numbers of persons who *might* have been hired or promoted in the absence of discrimination could easily number in the thousands. For example, in the nationwide steel consent decree, it was conservatively estimated that individual determinations by a special master for the 60,000 claimants, with each person's case taking one hour to resolve, would require 28 years. *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 851 n. 28 (5th Cir. 1975). Of course, one hour per case is grossly inadequate, considering the time needed to investigate and review qualifications of each claimant and other matters, such as what make whole relief is appropriate for him, and considering the likelihood of intervention by other employees.

The United States, perceiving the devastating impact upon affirmative action of any requirement to identify actual victims, argued to this Court in 1979:

> And even if some mechanism could be devised for identifying victims in the course of voluntary compliance efforts, the cost and delay of that effort would be prohibitive.

U.S.A./E.E.O.C. *Weber* brief at 53.

If Title VII is interpreted to impose the same limitations on remedies in every case, whether settled or litigated, and if that limitation is the identification of actual victims, then settling parties would be compelled to guard against threat of collateral attack by either (a) incorporating elaborate procedures to identify, with complete assurance, the actual victims and to determine their individual relief, *or* (b) securing the consent of *all* interveners and *potentially affected* third parties. The first alternative is a "settlement" that is just as time-consuming, expensive and burdensome as a trial. What would be the employer's motivation to admit liability or the employees' motivation to accept anything less than full backpay if they are required to present full proof of the extent of their individual injury?

The second alternative, negotiating a settlement among the plaintiff, defendant and all potentially affected third parties, is no alternative at all. It would be impossible to identify all potentially affected third parties, not to mention to secure their consent. Yet, no employer would enter into a consent decree if the decree were open to collateral attack from third parties who could invalidate the decree by showing that some of the persons identified were not actual victims of discrimination.

B. *Race-Conscious Remedies That Are Not Victim-Specific Are Fair*

Race-conscious remedies of the kind challenged by petitioners are not unfair to members of the historically favored race. Since race-conscious remedies are imposed to eradicate the effects of historical discrimination, such remedies will not unfairly injure third parties if the remedies are carefully constructed to integrate the disadvantaged class into the workforce to the degree that would have occurred absent discrimination. In many situations, one possible measure of the degree of minority participation in a non-discriminatory environment is the percentage of minorities in the community's labor force. When a white employee has *benefited* by the discrimination, it is not

unfair to retard his future promotions to make way for blacks or women as long as the *number* of blacks or women hired does not exceed the relative *number* of blacks or women that would have been hired absent discrimination. The impact on the favored class members is the same whether the proven victims receive their rightful places or whether the same number of persons (potential though not proven victims) occupy those places.[8]

Accordingly, any concern that employers will bargain away rights of non-minority employees to avoid the expense of litigation is unwarranted. As long as the district court has the responsibility to assure that the numerical impact of the decree's affirmative action provisions approximates the impact that non-discrimination would have had upon the favored class, then non-minorities will not be injured. Moreover, in considering the fairness of any class action settlement, the district court should evaluate the fairness of the proposed settlement upon class members as well as upon employees who may be affected by the settlement. In evaluating whether settlement is fair and adequate, the district court should apply this Court's guidelines for voluntary affirmative action as discussed in *Weber*. This approach is neither novel, unmanageable, nor impracticable. It is the very approach followed routinely by district courts in approving consent decrees, including the district court in Birmingham's Title VII litigation, and by appellate courts in reviewing the appropriateness of race-conscious remedies whether imposed by consent decree or otherwise.

---

[8] This argument was presented to this Court by the government in 1979 in its defense of voluntary affirmative action and applies equally to affirmative action incorporated in a court decree:

> Nor would the interests of white employees have been materially advanced if participation in the training program had been premised on the identification of particular blacks and women who had been victims of prior discrimination. The incumbent employees would be affected similarly by a remedy in favor of identifiable victims of specific discrimination as by a remedy that approximates that result by instead including a specified proportion of minority employees not so identified.

U.S.A./E.E.O.C. *Weber* brief at 33.

Thus, the legitimate interests of non-minorities are protected by the court when it considers whether race-conscious remedies are necessary and appropriate. Relevant to this determination is whether the relief is temporary and terminates when manifest racial imbalances are eliminated, whether there is evidence of historical discrimination, whether the discrimination was intentional, whether the relief does not unnecessarily trammel interests of whites by effectively barring their advancement or requiring their discharge and replacement with blacks, and whether beneficiaries of the relief are qualified for any employment opportunity conferred. *See Weber*, 443 U.S. at 208; *Paradise*, *supra*, 767 F.2d at 1527-34.

These considerations are entirely consistent with this Court's decision in *Stotts*, where the court-imposed layoff remedy unnecessarily trammeled rights of whites because it required discharge of whites, in contravention of a *bona fide* seniority system. The circumstances presented in *Stotts*, however, should constitute the only exception to the lawfulness of court-ordered race-conscious remedies that fail to identify specific victims. Absent a *bona fide* seniority system, Title VII does not guarantee non-minority employees protection against layoffs or preferential consideration in promotions. The absence of such guarantees, however, does not unfairly injure a non-minority as long as any advantages accorded to minorities pursuant to consent decree or other court order are appropriate to remedy past discrimination.

An employer's self-interest in limiting litigation costs by entering into consent decrees, therefore, does not threaten legitimate interests of incumbent employees. This Court's prior decisions in *Weber* and *Stotts* and the lower courts' role in assuring that race-conscious remedies comport with those decisions provide genuine protection to incumbent employees. Moreover, the employer's cost-consciousness is by no means an improper motivation for settlement. When the fact of discrimination is not a debatable matter, protracted litigation only perpetuates the discrimination, further entrenches its effects, delays relief to plaintiffs, and consumes financial resources that

might otherwise be utilized to meet municipal obligations.

Birmingham readily admits that one of its incentives to enter into its consent decree was to avoid further protraction of litigation which was in its seventh year and had cost tens of thousands of dollars, yet was guaranteed to last many more years and cost thousands of more dollars before all issues covering all City departments were finally tried. That seemingly interminable litigation would have been successfully terminated by the 1981 consent decree had it not been for the irresponsible reading, by the government and by some reverse discrimination plaintiffs, of this Court's decision in *Stotts*. In the eighteen months since *Stotts* was decided, Birmingham has expended hundreds of thousands of dollars defending -- from governmental and private challenge -- the very remedies sought by the government and carefully approved by the Court in 1981.

We cannot believe that this Court intended *Stotts* to cause such wasteful litigation, to erect such a barrier to settlement, or to deprive the lower courts of such a valuable tool to remedy effects of past discrimination regardless of the case's circumstances. Remarkably, the need for clarification of this Court's ruling in *Stotts* is not due to any conflict among the lower courts. Rather, clarification is needed to resolve a conflict between the lower courts, on the one hand, and the United States and private parties, on the other hand. The important factual differences between *Stotts* and the cases *sub judice* and the well-reasoned decisions below demonstrate that race-conscious remedies that are not confined to proven victims are necessary and appropriate in many cases. This Court should not extend its holding in *Stotts* to these cases. By affirming the decisions below, this Court would preserve a necessary and lawful remedy under Title VII and the Fourteenth Amendments which courts have used successfully for many years.

CONCLUSION

For the reasons stated, the judgments of the Courts of Appeals should be affirmed.

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AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
JAN 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 84-1656 and 84-1999

In The

Supreme Court of the United States

October Term, 1985

LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, et al.,
Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et al.,
Respondents.

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, C.L.C.,
Petitioner,

v.

CITY OF CLEVELAND, et al.,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Second and Sixth Circuits

BRIEF OF THE STATES OF CALIFORNIA, LOUISIANA, MICHIGAN, MINNESOTA, NEBRASKA, NEW JERSEY, NEW MEXICO, OREGON, WEST VIRGINIA, WISCONSIN, AND THE PENNSYLVANIA HUMAN RELATIONS COMMISSION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

Amici States and the Pennsylvania Human Relations Commission respectfully submit this brief in support of respondents. Amici urge this Court to affirm the decisions below, and thus affirm that court orders and other governmental action approving, mandating, or enforcing bona fide affirmative action plans are both lawful under Section 706(g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g), and constitutional under the equal protection guarantees of the Fifth and Fourteenth Amendments.

Amici's interest in these cases stems both from their interest in preserving the right of public employers to take appropriate steps to eliminate the effects of past discrimination within their own workforce and their interest in ensuring the effective enforcement of federal and state laws forbidding employment discrimination. Many of amici have themselves engaged in affirmative action to correct past discrimination.[1] Many of amici have also enforced affirmative action programs to redress employment discrimination which violates federal and state employment discrimination laws.[2] All of amici wish to preserve pro-

1. See, *e.g.*, *La Riviere v. Equal Employment Opportunity Commission*, 682 F.2d 1275 (9th Cir. 1982), approving a voluntary affirmative action program designed to eliminate the effects of past gender-based discrimination in the California Highway Patrol. See also *Clansil v. City of Pittsburgh*, 488 Pa. 470, 412 A.2d 860 (1980), upholding a voluntary affirmative action plan adopted by the Pittsburgh Civil Service Commission to help remedy past racial discrimination by the Pittsburgh Bureau of Fire, and *Local 376-M, Michigan Corrections Organization, etc. v. State of Michigan*, 130 Mich. App. 586, 344 N.W.2d 341 (1983), rejecting constitutional challenge to affirmative action plan.

2. See, *e.g.*, *Department of Fair Employment and Housing v. City and County of San Francisco*, FEHC Dec. No. 82-11 (1982-83 CEB 5), appeal pending, ordering Fire Department of San Francisco to engage in an affirmative action program to remedy past race discrimination in promotions.

remedial use of bona fide affirmative action plans to remedy past employment discrimination.

In amici's experience, the goals and timetables established by affirmative action plans have proven to be an effective means of eradicating the effects of past discrimination, particularly for jobs which have been historically segregated or for employers which have resisted voluntary efforts to integrate their work-force. Affirmative action efforts are frequently necessary if equal employment opportunity is to become a reality for this generation of employees, and not merely the goal for future generations who may benefit from the mere elimination of discriminatory practices.

Amici will address the lawfulness of court-ordered and/or court-approved affirmative action plans to remedy the effects of past employment discrimination. Since similar statutory and constitutional challenges to the legality of such plans are raised in Nos. 84-1656 and 84-1999, amici submit this one brief for consideration in both cases.

The State of California, through its Attorney General John K. Van de Kamp, and the other Amici States through their Attorneys General, therefore submit this brief pursuant to Supreme Court Rule 36.4. Amicus Pennsylvania Human Relations Commission files this brief with the consent of the parties pursuant to Supreme Court Rule 36.2.

SUMMARY OF ARGUMENT

Bona fide affirmative action plans, establishing goals and timetables to eliminate the effects of past discrimination, are lawful and necessary remedies for unlawful employment discrimination. Courts may approve, impose, or enforce such plans consistent with statutory and constitutional guarantees, and the beneficial results of bona fide affirmative action efforts move the work force closer to the goal of equal employment opportunity for all.

In this brief, amici address the propriety of goals and timetables as a remedy under § 706(g) of Title VII, whether such a remedy is voluntarily adopted and included in a court-approved consent decree,[3] or is imposed by a court after a finding of past discrimination.[4] Affirmative action plans further Title VII's goal of eradicating employment discrimination, and are permissible remedies under § 706(g) of Title VII.

Furthermore, amici will demonstrate that governmental involvement in race-conscious affirmative action plans, whether such involvement results from court action or from voluntary action by public employers, is consistent with the constitutional guarantee of equal protection.[5] So long

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3. Nos. 84-1999 involves court approval of an affirmative action plan in a consent decree resolving a Title VII action alleging race discrimination by a public employer against minority firefighters (*Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479 (6th Cir. 1985), cert. granted sub nom. *Local Number 93, International Association of Firefighters, AFL-CIO, C.L.C. v. City of Cleveland*, — U.S. — [106 S.Ct. 59] (1985) (No. 84-1999)). Petitioners therein, joined by the United States Department of Justice, argues that § 706(g) of Title VII prohibits court approval of such a plan.

4. Nos. 84-1656 involves a court-ordered affirmative action plan after a judicial finding of unlawful discrimination by a union (*Equal Employment Opportunity Commission v. Local 638 ... Local 28 of the Sheet Metal Workers' Int'l. Ass'n.*, 753 F.2d 1172 (2d Cir. 1985), cert. granted sub nom. *Local 28 of the Sheet Metal Workers' Int'l. Ass'n. v. Equal Employment Opportunity Commission*, — U.S. — [106 S.Ct. 58] (1985) (No. 84-1656)). Petitioners therein, again joined by the United States Department of Justice, argue that § 706(g) of Title VII prohibits courts from ordering the adoption of race-conscious affirmative action plans.

5. Nos. 84-1656 and 84-1999 raise equal protection objections to the affirmative action plans at issue in the respective cases. Petitioners in No. 84-1656, joined by the Justice Depart-

(Continued on following page)

as affirmative action plans are carefully structured to undo the effects of past discrimination, and satisfy the guidelines for bona fide plans which this Court enunciated in United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193, 208-209 (1979) and *Fullilove v. Klutznick*, 448 U.S. 448, 480-492 (1980) (Burger, C.J., with White, and Powell, JJ.) and 520-521 (conc. op. Marshall, J., with Brennan and Blackmun, JJ.), equal protection guarantees are satisfied.

ARGUMENT

I. TITLE VII PERMITS COURTS TO APPROVE, IMPOSE, OR ENFORCE AFFIRMATIVE ACTION PLANS TO REMEDY THE EFFECTS OF PAST EMPLOYMENT DISCRIMINATION

A. Prospective Relief Has Long Been Recognized As an Appropriate Means of Eliminating the Effects of Past Discrimination.

In *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979), this Court held that Title VII does not prohibit voluntary bona fide affirmative action plans preventing racial preferences in order to eliminate traditional patterns of racial segregation, stating that ". . . Congress chose not to forbid all voluntary race-conscious affirmative action." *(Id., at 206)*. However, *Weber* did not address "what a court might order to remedy a past proved violation of the Act." *(Id., at 200)*.[5]

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courts, as per that court ordered affirmative action offends equal protection, and petitioner in No. 84-1999 argues that the consent decree decree race-conscious equal protection. The Justice Department also suggests in a footnote that the relief awarded in No. 84-1999 is unconstitutional.

6. Weber also did not address equal protection implications which arise if public employers adopt affirmative action

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During the more than 20 years that Title VII has been in existence, however, the judicial enforcement provision of the Act has been widely understood as permitting courts to order race-conscious affirmative action which operates prospectively to eliminate the effects of past discrimination, in addition to make-whole relief to individual victims of discrimination. The prospective relief which benefits the class victimized by discrimination, plus the make-whole relief to identified individuals, serve, respectively, "the central statutory purposes [of Title VII] of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." (*Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975)).

The judicial authority provision of Title VII, § 706(g) of Title VII, 42 U.S.C. § 2000e-5(g) (hereinafter § 706(g)), is certainly broad enough to support an order requiring prospective affirmative action. It provides, in pertinent part, that a "court may . . . order such affirmative action as may be appropriate, . . . or any other equitable relief as the court deems appropriate." Pursuant to this statutory authority, "federal courts have freely exercised their broad equitable discretion to devise prospective relief designed to assure that employers found to be in violation of § 707(a) [of Title VII, 42 U.S.C. § 2000e-6(a)] eliminate their discriminatory practices and the effects thereof

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plans (Weber, 443 U.S. at 200, but, as a statutory matter, public and private employers are equally subject to Title VII. Non-federal public employers are included within the statutory definition of "employer" (§ 701(b) of Title VII, 42 U.S.C. § 2000e(b)), except for political officers and their immediate staff (§ 701(f) of Title VII, 42 U.S.C. § 2000e(f)), and federal employees are also protected (§ 717 of Title VII, 42 U.S.C. § 2000e-16). As discussed infra, constitutional equal protection concerns also do not prohibit race-conscious remedial plans.

from." (*International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 361 n. 47 (1977)).

Eliminating the effects of discriminatory practices is unquestionably one of the goals of Title VII. As stated in *Albemarle*, 422 U.S. at 418:

> "Where racial discrimination is concerned, 'the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar discrimination in the future' [Citation.]"

See also *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 770 (1976), and *Teamsters*, 431 U.S. at 364, quoting this portion of *Albemarle*.

Absent any affirmative efforts, the mere ending of discriminatory practices will do little to assist the present generation of employees who have been victimized by discrimination. If the effects of past discrimination are left to be dissipated by time alone, the right to full equality in employment opportunity will remain only a goal, and not a reality, for many years to come. As Justice Marshall observed in *Regents of the University of California v. Bakke*, 438 U.S. 265, 396-398 (1978) (Marshall, J., concurring and dissenting):

> "The position of the Negro today in America is the tragic but inevitable consequence of centuries of racial treatment. Measured by any benchmark of material or achievement, meaningful equality remains a distant dream for the Negro.
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> . . .
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> "In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society."

The early school desegregation cases confirm that the mere ending of discriminatory practices is often an incomplete remedy, and that race-conscious plans may be necessary to remedy the effects of past discrimination. As stated in *Green v. County School Board of New Kent County*, 391 U.S. 430, 437-438 (1968):

> "School boards . . . were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."

Similarly, in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 28 (1971), the Court said:

> "'Racially neutral' . . . plans may fail to counteract the continuing effects of past school segregation. . . ."

And as stated in a companion case approving a race-conscious student assignment plan, *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971):

> "Any other approach would freeze the status quo that is the very target of all desegregation processes."

The purposes of Title VII are similarly frustrated by practices which "operate to 'freeze' the status quo of prior discriminatory employment practices." (*Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971)).

As noted above, the language of § 706(g) is certainly broad enough to encompass an award of prospective affirmative action. Courts' authority under § 706(g) has always been described as broad equitable discretion to correct "a historic evil of national proportions." (*Albemarle*, 422 U.S. at 416). As further explained in *Albemarle*, 422 U.S. at 418:

> ". . . Congress took care to arm the courts with full equitable powers. For it is the historic purpose of equity to 'secur[e] complete justice.' . . ."

See also *Franks*, 424 U.S. at 764, and *Teamsters*, 431 U.S. at 361 n.47.

The equity powers of the courts have long been relied upon in school cases to implement race-conscious plans. In *United States v. Montgomery County Board of Education*, 395 U.S. 225, 227 (1969), where the Court approved a district court order which, among other relief ordered, established a ratio for white to minority faculty, the Court explained that district courts are "to be guided by traditional equitable flexibility to shape remedies in order to adjust and reconcile public and private needs." As further explained in *Swann v. Charlotte-Mecklenburg*, 402 U.S. at 15:

> "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."

Relying on the broad equitable authority granted courts by § 706(g), a multitude of courts, including this Court, have approved race-conscious plans providing prospective relief to a class, once a pattern or practice of discrimination against that class is shown. Make-whole relief for individual members of that class may require a showing of actual injury, but such evidence has never been required for class-wide prospective relief. In *Teamsters*, this Court noted, with apparent approval, a consent decree which, *inter alia*, obligated the employer to hire one minority person for every white person hired until work force parity was attained (*Id.*, 431 U.S. at 330 n.4). As the Court explained:

> "[A] court's finding of a pattern or practice justifies an award of prospective relief. Such relief might take the form of an injunctive order against continuation of the discriminatory practice, an order

> that the employer keep records of its future employment decisions and file periodic reports with the court, or any other order 'necessary to ensure the full enjoyment of the rights' protected by Title VII." (*Id.*, at 361).

Footnote 47 in the above quotation described the authority of federal courts to order prospective relief.

Numerous decisions by appellate and district courts have similarly awarded or approved affirmative actions plans which operate prospectively to eliminate the vestiges of past discrimination.[7] While these cases are too numerous to attempt a comprehensive listing herein, the Court is certainly aware of the plethora of opinions and consent decrees and can take notice that any determination that such plans violate rather than remedy Title VII will cause an immense upheaval.

This Court and lower federal courts have thus consistently approved consent decrees which include affirmative action plans, and federal appellate and district courts have frequently imposed such plans as part of the relief ordered in Title VII cases. In light of the broad equitable power granted to courts under § 706(g), the consistent use of this discretionary equitable power to adopt or impose affirmative action plans, and the continuing need to

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7. "In Title VII class-action suits, the Courts of Appeals are unanimously of the view that 'race-conscious affirmative relief can also be "appropriate" under § 706(g).'" *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, —, [104 S.Ct. 2576, 2606] (1984) (Blackmun, J., dissenting, with Brennan and Marshall JJ.). Footnote 10 in the above quotation provides citations to opinions from each circuit approving the use of affirmative action remedies in Title VII pattern or practice cases. See also Spiegelman, *Court-Ordered Hiring Quotas after Stotts: A Narrative etc.*, 30 Harv. C.R.-C.L. Rev. 139, 145 and n. 15 (1985) ("[T]he courts of appeals in over fifty cases have upheld quotas as remedies for adjudicated violations of the Act.")

eliminate the residual effects of past discrimination, which is one of the central purposes of Title VII, § 706(g) should continue to be interpreted as authorizing courts to award all appropriate relief, including, where necessary, affirmative action plans.

B. Nothing in Stotts Requires This Court To Reverse the Widely Accepted Understanding of § 706(g).

Despite the long-held understanding that appropriate Title VII remedies include bona fide affirmative action plans establishing goals and timetables which operate prospectively to undo the effects of past discrimination, petitioners, joined by the United States Department of Justice, argue that this remedy now violates Title VII. The basis for this argument is one sentence taken from this Court's decision in *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 [104 S.Ct. 2576] (1984).

In *Stotts*, the Court, relying on *Franks*, 424 U.S. at 764-766, and *Teamsters*, 431 U.S. at 367-371, ruled that while individual victims of discrimination may be awarded make-whole relief, including retroactive, competitive seniority, "mere membership in the disadvantaged class is insufficient to warrant a seniority award; each individual must prove that the discriminatory practice had an impact on him." (*Stotts*, 104 S.Ct. at 2588).

While *Stotts* dealt solely with a district court's authority under § 706(g) to override bona fide seniority systems, the decision further states that the policy behind § 706(g) is "to provide make-whole relief only to those who have been actual victims of illegal discrimination, . . ." (*Stotts*, 104 S.Ct. at 2589). Petitioners and supporting *amici* seek to transform this sentence into a limitation of not merely make-whole retroactive relief, but also of any prospective relief in the form of goals and timetables for hiring or promoting members of the victimized class.

While the impact of *Stotts* on affirmative action plans is, of course, an issue only this Court can decide, the interpretation urged by petitioners and supporting *amici* is contrary to that given *Stotts* by every circuit court which has addressed this question. Furthermore, petitioners' overbroad interpretation undercuts the effectiveness of Title VII as a statute designed to eliminate the effects of past discrimination.

If *Stotts* means that voluntary consent decrees may not include affirmative action provisions, the illogical result would be that plans lawful under *Weber* somehow become unlawful when approved by courts. As stated in *Deveraux v. Geary*, 765 F.2d 268, 274 (1st Cir. 1985), pet. for cert. filed, 54 U.S.L.W. 3229 (Sept. 19, 1985) (No. 85-392):

> "The expansive reading of *Stotts* urged by [non-minority employees objecting to an affirmative action consent decree] would require us to find that *Stotts* overruled *Weber sub silentio*. In view of the importance of any such action, it seems likely that the Court would have directly addressed *Weber* if it had intended to overrule that decision. All the circuits considering the issue have concluded in the absence of any express pronouncement to the contrary, that *Weber* remains good law."[8]

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8. Decisions which, like *Deveraux*, approve affirmative action consent decrees and reject the "argument that the *Stotts* Court meant to rewrite Title VII law to make all affirmative action plans improper absent a finding of actual past discrimination" (*Deveraux*, 765 F.2d at 271) include, in addition to one of the two decisions at issue herein, *Vanguards*, 753 F.2d at 468 n. 7 ("[T]o apply *Stotts* to voluntary employer plans would mean that all such plans are impermissible under title VII no matter how reasonable. This reading of *Stotts* is directly contrary to *Weber*."); *Massachusetts Ass'n of Afro-American Police, Inc. v. Boston Police Department*, — F.2d —, (1st Cir. Dec. 20, 1985); *Kromnick v. School District of Philadelphia*, 739 F.2d 894, 911

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Furthermore, if state forbids court-imposed affirmative action remedies for proven violations of Title VII, then courts, despite their broad equitable powers, are severely denied perhaps the most effective means of eliminating discriminatory effects. State prohibits courts from disturbing seniority plans, except where necessary to provide complete relief to individual victims of discrimination, but State has no effect on court-imposed affirmative action plans which merely provide prospective classwide relief, and do not adversely affect vested seniority rights.*

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(3d Cir. 1984), cert. denied, — U.S. — [105 S.Ct. 782] (1985); United States v. City of Cincinnati, 771 F.2d 961, 968 (6th Cir. 1985) ("State did not control this [non-seniority] issue."); Van Aken v. Young, 750 F.2d 43, 45 (6th Cir. 1984) ("[H]ere we deal with a remedy applied voluntarily by a public employer at the point of hiring. Thus contrary to the facts of State, no employees with vested seniority rights were deprived of them."); Britton v. South Bend Community School Corp., 775 F.2d 794, 800 (7th Cir. 1985) ("Unlike State, there is no override of a bona fide seniority plan. . . . State did not even purport to, much less actually, override Wygant."); Craver v. City of Madison, 730 F.2d 506, 595 n.5 (7th Cir. 1984), cert. denied, — U.S. — [105 S.Ct. 256] (1984) ("[. . . State involved seniority rights, which cannot be awarded to one employee without adversely affecting the rights of other employees, while the male detectives here lost nothing when the city remedied the discrimination against women."); Farmer v. Prescott, 767 F.2d 1514, 1520 (11th Cir. 1985) ("[T]he central issue in [State] concerned the district court's authority to override a bona fide seniority system to require layoffs of more senior whites, in the absence of a showing of intentional discrimination. Here, the order under review involves promotions, not layoffs pursuant to a bona fide seniority system."); and Turner v. Orr, 759 F.2d 817, 824 (10th Cir. 1985), pet. for cert. filed, 54 U.S.L.W. 3886 (July 11, 1986) (No. 85-1777) ("[A] primary basis of the Supreme Court's holding in State is that the district court's order required the city to violate the provisions of a bona fide seniority system.").

9. Decisions rejecting the applicability of State to court-imposed affirmative action remedies which do not affect vested seniority rights include, in addition to the other decisions as discussed herein, Local 638 . . . Local 28, 753 F.2d at 1086 ("In our case § 703(h) is not involved because there is no seniority plan in

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Bona fide seniority systems have long been recognized to be beyond the reach of Title VII remedies, absent proof that individual persons have been victims of discriminatory employment practices. Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), provides that such plans are not unlawful, and prior decisions of this Court have held that such plans do not violate Title VII even though they may perpetuate the effects of past discrimination (*Franks*, 424 U.S. at 761). As stated in *Teamsters*, 431 U.S. at 349, where the Court held that bona fide seniority systems were immune from the *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971), analysis of unlawful discriminatory effect:

> "Were it not for § 703(h), the seniority system in this case would seem to fall under the *Griggs* rationale."

Nevertheless, neither § 703(h) of Title VII nor the expectations of other innocent employees bar courts from approving or awarding make-whole relief, including retroactive seniority, to individual victims (*Franks*, at 774-775, and *Teamsters*, at 367). The lower court's errors in *State* were to fail to limit seniority awards to individual discriminatees and to attempt to override a seniority system merely to eliminate discriminatory effects. As explained in *State*, 106 S.Ct. at [2]:

> "The difficulty with this approach is that it overstates the authority of the trial court to disregard a seniority system in fashioning a remedy after

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conflict with the remedies imposed by AAMP or the [and order]."); United States v. City of Buffalo, — F.2d — (2d Cir. Dec. 19, 1985) ("[T]he decree in this case does not conflict with a seniority plan protected by § 703(h) [or] . . . ."); and Dias v. American Tel. & Tel., 752 F.2d 1356, 1360 n.5 (9th Cir. 1985)

a plaintiff has successfully proved that an employer has followed a pattern or practice having a discriminatory effect on black applicants or employees."

Stotts has no effect, however, on a trial court's authority to fashion relief which does not intrude on seniority rights. Affirmative action goals and timetables, whether adopted in a voluntary consent decree or imposed as a court remedy, are an effective means of eradicating the vestiges of discrimination. Title VII's remedial provision, § 706(g), should therefore be construed so as to permit affirmative action plans[10] and thus permit the goal of equal employment opportunity to become a reality within the foreseeable future.

II. COURT ORDERS WHICH APPROVE, IMPOSE, OR ENFORCE AFFIRMATIVE ACTION PLANS ARE CONSTITUTIONALLY PERMISSIBLE

Race-conscious plans have long been recognized as a legitimate means to eliminate the effects of past discrimination, and this Court has consistently held that governmental classifications on the basis of race are not unconstitutional *per se*. Such classifications must, of course, be scrutinized under the equal protection guarantee

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10. Since affirmative action plans which do not affect the bona fide seniority rights protected by § 703(h) of Title VII are appropriate under § 706(g) either as consent decrees or as court-imposed remedies, this Court need not decide whether district courts may ever approve consent decrees which they have no authority to order as a remedy. Furthermore, affirmative action plans embodied in either voluntary consent decrees or court-imposed orders are also permissible under § 703(j) of Title VII, 42 U.S.C. § 2000e-2(j). This section means only that employers are not required to grant racial preferences merely because of racially imbalanced work forces, not that racial preferences are prohibited (*Weber*, 443 U.S. at 205-206).

established by the Fourteenth Amendment and the equal protection component of the Fifth Amendment,[11] but racial classifications by the government are constitutional so long as they are justified by, and necessary for the achievement of, a sufficiently important governmental interest. The most recent reaffirmation of this principle is found in *Palmore v. Sidoti*, 466 U.S. 429, — [104 S.Ct. 1879, 1882] (1984), in which this Court, in holding that private prejudice did not justify racial classifications divesting a natural mother of custody of her child, unanimously stated:

> "[Racial] classifications are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of its legitimate purpose [citations omitted]."

Similarly, in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), where this Court upheld the federal statute setting aside for minority-owned businesses a percentage of federal funds granted to public works projects, the Court rejected the contentions that all racial classifications by the government are unconstitutional and that governmental actions must be "color-blind". As stated in the opinion announcing the judgment of the Court:

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11. Court orders such as those at issue in the instant case are, of course, governmental action and thus subject to scrutiny under equal protection guarantees. The Fourteenth Amendment governs racial classifications by state courts (*Shelley v. Kraemer*, 334 U.S. 1, 14-18 (1948); *Palmore v. Sidoti*, 466 U.S. 429, — n. 1 [104 S.Ct. 1879, 1881-1882 n. 1] (1984)). The Due Process Clause of the Fifth Amendment includes an equal protection component imposing similar standards on actions of the federal government (*Bolling v. Sharpe*, 347 U.S. 497, 500 (1954); *Fullilove v. Klutznick*, 448 U.S. 448, 500 (1980)), including federal courts (*Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 19 (1971);

> "Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." (438 U.S. at 291) (Burger, C.J., joined by White and Powell, JJ.)

Other members of the Court agreed that racial classifications were permissible under the equal protection guarantee in appropriate situations. See *Fullilove*, 448 U.S. at 496 (Powell, J., concurring), and 448 U.S. at 517 (Marshall, J., concurring, joined by Brennan and Blackmun, JJ.)

Likewise, in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), a majority of the members of this Court approved, in principle, the adoption of race-conscious affirmative action plans by governmental entities. In announcing the judgment of the Court, Justice Powell stated that state racial classifications are constitutionally permissible if the state shows a substantial purpose or interest, and the use of racial classifications is necessary to accomplish that purpose or safeguard that interest (438 U.S. at 305). As other members stated:

> "[R]acial classifications are not *per se* invalid under the Fourteenth Amendment." (438 U.S. at 326) (Brennan, J., concurring and dissenting, joined by White, Marshall, and Blackmun, JJ.).

The use of racial classifications by courts to remedy past discrimination has also long been recognized as both necessary and constitutional in school desegregation cases. In *United States v. Montgomery Board of Education*, 395 U.S. 225 (1969), *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), and *Davis v. Board of School Comm'rs. of Mobile County*, 402 U.S. 33 (1971), the Court approved a variety of race-conscious remedies

imposed by federal courts to correct historic discrimination in public schools.

Furthermore, while recent decisions of this Court have declined to address the constitutionality of governmental affirmative action as a remedy for employment discrimination,[12] school desegregation cases have approved court-imposed racial classifications of teachers and staff to achieve racial balance among schools. In *United States v. Montgomery County Board of Education*, 395 U.S. at 232-236, granting the request of petitioner United States, the Court directed the affirmance of a district court order desegregating the faculty and staff of a public school system. The district court judge had ordered the board of education to move towards a goal of a ratio of black and white faculty in each school which was substantially the same as existed throughout the system. The order set out a schedule to achieve this goal, specifying a minimum number of minority teachers to be assigned full-time to each school during the next school year, and a ratio of minority substitute, student, and night school teachers. See also *Davis v. Board of School Comm'rs. of Mobile County*, 402 U.S. at 33, and *Milliken v. Bradley*, 433 U.S. 267, 283 (1977).

As explained in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. at 19:

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12. United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193, 200 (1979), did not involve governmental action, and Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 — [104 S.Ct. 2576, 2585] (1984), only addressed a court's authority to override a bona fide seniority system, not affirmative action plans which do not interfere with seniority rights.

> "[T]he Mobile school board has argued that the Constitution requires that teachers be assigned on a 'color blind' basis. It also argues that the Constitution prohibits district courts from using their equity powers to order assignment of teachers to achieve a particular degree of faculty desegregation. We reject that contention."

While this Court has declined to review this position in recent employment discrimination decisions, many recent decisions by each circuit court of appeals, in affirming the use of affirmative action programs, have necessarily rejected any contention that such programs violate equal protection guarantees either when adopted by a public employer or approved by court order.[11] Taken each of

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11. See, e.g., *Deveraux v. Geary*, 765 F.2d 268, 274-275 n.5 (1st Cir. 1985), pet. for cert. filed, 54 U.S.L.W. 3239 (Sept. 19, 1985) (No. 85-492) ("We adhere to the precedent upholding the validity of voluntary affirmative action programs instituted by public employers."); *Bushey v. New York State Civ. Serv. Comm'n.*, 733 F.2d 220, 227 n.8 (2d Cir. 1984), cert. denied, — U.S. — [105 S.Ct. 801] (1985); *Kirkland v. New York State Dept. of Correctional Services*, 711 F.2d 1117, 1130 (2d Cir. 1983), cert. denied, 465 U.S. 1005 (1984); *Kromnick v. School Dist. of Philadelphia*, 739 F.2d 894, 900-901 (3d Cir. 1984), cert. denied, — U.S. — [105 S.Ct. 782] (1985); *Patterson v. American Tobacco Co.*, 535 F.2d 257, 274 (4th Cir. 1976), cert. denied, 429 U.S. 920 (1976); *Williams v. City of New Orleans*, 729 F.2d 1554, 1560-1561 (5th Cir. 1984); *United States v. City of Miami*, 664 F.2d 435, 442 (5th Cir. 1981) ("A consent decree may properly include provisions requiring the defendant to take affirmative action remedying the effects of past discrimination."); *Van Aken v. Young*, 750 F.2d 43, 45 (6th Cir. 1984) ("[A]gainst the long history of the patent racially discriminatory hiring record of the Detroit Fire Department the voluntary race-conscious affirmative action plan' . . . did not violate any applicable federal constitutional or statutory provision."); *Wygant v. Jackson Board of Education*, 746 F.2d 1152, 1155-1157 (6th Cir. 1984), cert. granted, — U.S. — [105 S.Ct. 2015] (1985); *Boston v. City of Detroit*, 704 F.2d 870, 895-896 (6th Cir. 1983), cert. den. 719 F.2d 732 (1983), cert. denied, 464 U.S. 1009 (1984); *Bolton v. South Bend Community*

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these circuits has misread the import of *Bakke* and *Fullilove*, and has misunderstood the history of cases approving race-conscious remedies to eradicate school segregation, these decisions correctly determine that both courts and public employers may, consistent with equal protection guarantees, utilize affirmative action plans to eliminate the effects of past employment discrimination.

A determination that affirmative action plans involving governmental action are not *per se* violations of equal protection does not, of course, mean that all such plans are bona fide and will survive constitutional scrutiny. The standard of review applicable to governmental efforts to undo the effects of past racial discrimination in employment has not been definitively established by this Court, but recent cases do establish that even though racial classifications are designed to correct past discrimination, such classifications will be closely monitored by the courts to ensure that the government's interest in implementing affirmative action is sufficiently strong and that the plan

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School Corp., 775 F.2d 794, 801 (7th Cir. 1985) ("The Supreme Court has consistently held that a governmental body may use race-conscious plans to eradicate the effects of past discrimination."); *Janowiak v. Corporate City of South Bend*, 750 F.2d 557, 561 (7th Cir. 1984), pet. for cert. filed, 53 U.S.L.W. 3896 (June 10, 1985) (No. 84-1936); *Warsocki v. City of Omaha*, 726 F.2d 1358, 1360 (8th Cir. 1984); *Setser v. Novack Investment Co.*, 657 F.2d 962, 965-966 n.2 (8th Cir. 1981) (en banc), cert. denied, 454 U.S. 1064 (1981); *Johnson v. Transportation Agency, Santa Clara County*, 770 F.2d 752, 756 (9th Cir. 1985); *La Riviere v. Equal Employment Opportunity Commission*, 682 F.2d 1375, 1380 (9th Cir. 1982); *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 944 (10th Cir. 1979); *Pacheco v. Prescott*, 767 F.2d 1514, 1520 (11th Cir. 1985); *and Segar v. Smith*, 738 F.2d 1249, 1293-1294 (D.C. Cir. 1984), cert. denied, — U.S. — [105 S.Ct. 2157] (1985).

is carefully and narrowly drawn so as to be sufficiently related to the plan's purpose.

In *Bakke*, where a majority of members of this Court agreed that appropriate race-conscious affirmative action efforts by governmental entities do not violate equal protection guarantees, four Justices opined that racial classifications which are drawn for remedial purposes need not be subjected to the same strict scrutiny analysis applicable to racial classifications which are drawn to stigmatize or which are based upon racial hatred or prejudice. Instead of requiring that remedial racial classifications be necessary to further a compelling governmental interest, with no less restrictive alternatives available, these Justices concluded that "racial classifications designed to further remedial purposes '"must serve important governmental objectives and must be substantially related to achievement of those objectives."'" (*Bakke*, 438 U.S. at 359) (Brennan, J., concurring and dissenting, joined by White, Marshall, and Blackmun, JJ.). Justice Powell, whose opinion announced the judgment of the Court, applied the same strict scrutiny test applicable to other racial classifications, requiring that "'a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is "necessary . . . to the accomplishment" of its purpose or the safeguarding of its interest.'" (*Id.*, at 305).[14]

In *Fullilove*, the Court similarly failed to have a majority of Justices clarify the applicable standard of review.

14. The opinion of the other four justices did not address the constitutional issue. (*Bakke*, 438 U.S. at 412) (Stevens, J., concurring and dissenting, joined by Burger, C.J., and Stewart and Rehnquist, JJ.).

Three Justices held that they need not adopt either of the analyses articulated in *Bakke*, since the statute in question would survive scrutiny under either test (*Fullilove*, 448 U.S. at 492) (Burger, C.J., joined by White and Powell, JJ.), while three other Justices relied on their opinion in *Bakke* to hold that the appropriate test is "whether racial classifications designed to further remedial purposes serve important governmental objectives and are substantially related to achievement of those objectives." (*Fullilove*, 448 U.S. at 519) (Marshall, J., joined by Brennan and Blackmun, JJ.).

Most recently, in *Palmore v. Sidoti*, the Court did unanimously apply strict scrutiny to a racial classification, but the classification at issue was based upon private prejudice, not a remedial purpose. Nevertheless, the language in that decision arguably means that this Court will conclude that strict scrutiny is always the applicable test. As stated therein:

> "A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race. [Citation.] Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category. [Citation.] Such classifications are subject to the most exacting scrutiny; . . ." (*Id.*, 104 S.Ct. at 1881-1882) (footnote omitted).

Whether the applicable standard of review is traditional strict scrutiny or a less rigorous analysis, bona fide affirmative action plans are nonetheless constitutional so long as the plans satisfy the guidelines described by this Court in approving race-conscious remedial plans. If affirmative action plans are carefully drawn to eliminate

the effects of past discrimination, then they will "survive judicial review under either 'test' . . . ." (*Fullilove*, 448 U.S. at 492) (Burger, C.J., joined by White and Powell, JJ.).

III. AFFIRMATIVE ACTION PROGRAMS FURTHER THIS NATION'S GOAL OF ERADICATING ALL EFFECTS OF PAST DISCRIMINATION.

This country has established the goal of achieving full equality in employment opportunity, but this goal will not be attained, or even approached, within a reasonable period of time unless efforts are made in both the private and public sectors to undo the effects of years of discrimination. Eliminating past discriminatory effects in employment is, of course, one of Title VII's primary purposes (*Albemarle*, 422 U.S. at 418 and 421; *Franks*, 424 U.S. at 770; and *Teamsters*, 431 U.S. at 364).

As discussed above, affirmative action remedies for Title VII have been approved by every circuit court. Affirmative action plans have also been required or approved by numerous federal and state governmental entities as an effective means to eliminate the effects of past discrimination and attain full equality.[15]

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15. Federal affirmative action efforts, in addition to the public works program approved in *Fullilove*, include Executive Order 11246, 30 Fed. Reg. 12319 (1965) and 41 C.F.R. Parts 60-2 and 60-4 (1985) (federal contractors); Executive Order 11478, 34 Fed. Reg. 12985 (1969) (federal employees); and EEOC Guidelines on Affirmative Action, 29 C.F.R. Part 1608 (1985) (Title VII employers).

Almost every state has statutes, regulations, or executive orders requiring affirmative action efforts to correct the effects of

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Affirmative action plans have won widespread approval from both courts and other governmental entities because such plans are both necessary and effective. Affirmative action efforts have proven their value.

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past discrimination. See Alaska Stat. §§ 44.19.444-44.19.445 (1985), and Alaska Admin. Order No. 59, reported in 8A *Fair Emp. Prac. Man.* (BNA) 451:225; Arizona Exec. Order No. 83-5, reported in 8A *Fair Emp. Prac. Man.* (BNA) 451:436; Cal. Gov't Code §§ 19400-19406, 19790-19798 (West 1980), Cal. Exec. Orders Nos. 8-85-81 and D-20-83, reported in 8A *Fair Emp. Prac. Man.* (BNA) 451:851, and Cal. Admin. Code tit. 2, Rule 7286.8, reprinted in 8A *Fair Emp. Prac. Man.* (BNA) 451: 862; Colo. Exec. Order dated April 16, 1975, reported in 8A *Fair Emp. Prac. Man.* (BNA) 451: 1036, Colo. Admin. Code (4 CCR) § 1-6-1, reprinted in 8A *Fair Emp. Prac. Man.* (BNA) 451:1039, Colo. Admin. Code (4 CCR) §§ 5-2-4 and 5-6-1 et seq., reprinted in 8A *Fair Emp. Prac. Man.* (BNA) 451:1105, Colo. Admin. Code (1 CCR) § 801-9, reprinted in 8A *Fair Emp. Prac. Man.* (BNA) 451:1120, and Colo. Admin. Code (1 CCR) § 90.11, reprinted in 8A *Fair Emp. Prac. Man.* (BNA) 451: 1157; Conn. Gen. Stat. Ann. § 46a-68 (West Supp. 1985), and Conn. Exec. Order No. 9, reported in 8A *Fair Emp. Prac. Man.* (BNA) 451:1246; Del. Exec. Orders Nos. 74 and 81, reported in 8A *Fair Emp. Prac. Man.* (BNA) 451:1446; D.C. Code § 1-2524 (1981), D.C. Code §§ 1-307 - 1-314 and 1-1141 - 1-1151 (1981); Fla. Stat. Ann. § 110.112 (West 1982), and Fla. Exec. Order No. 79-50, reported in 8A *Fair Emp. Prac. Man.* (BNA) 451:1827; Ga. Exec. Order dated July 29, 1976, reported in 8A *Fair Emp. Prac. Man.* (BNA) 451:2051; Hawaii Exec. Order Nos. 77-4 and Admin. Directive 80-2, reported in 8A *Fair Emp. Prac. Man.* (BNA) 451: 2259, and Hawaii Equal Employment Opportunity Regulations §§ 12-11-1 - 12-11-7, reprinted in 8A *Fair Emp. Prac. Man.* (BNA) 451:2351; Ill. Ann. Stat. ch. 68, §§ 2-105 and 7-105 (Smith-Hurd Supp. 1985), Ill. Ann. Stat. ch. 127, §§ 63b and 139b (Smith-Hurd Supp. 1985), 56 Ill. Admin. Code 2520, Subpart G, and 44 Ill. Admin. Code 750, Subpart C; Ind. Code Ann. §§ 4-15-12-1 et seq. (Burns Supp. 1985); Iowa Admin. Code § 240, Chapters 2.11 et seq., reprinted in 8A *Fair Emp. Prac. Man.* (BNA) 451:3091, and Iowa Admin. Code § 240, Chapters 20.1 et seq., reprinted in 8A *Fair Emp. Prac. Man.* (BNA) 451:3151; Kan. Admin. Regs. 21-30-14 et seq., reprinted in 8A *Fair Emp. Prac. Man.* (BNA) 451:3306; Ky. Rev. Stat. §§ 45.550-45.640 (1980), and Ky. Exec. Orders Nos. 80-806 and 84-549, reported in 8A *Fair Emp. Prac.*

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"During the 1970's, the U.S. Commission on Civil Rights released studies approving affirmative action and documenting employment gains for blacks in industries adopting affirmative action." (Heaney, *Basing Timetables, Goals, and Ratios: Touchstones*

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Mass. (BNA) 455:74; Me. Rev. Stat. Ann. tit. 5, §§ 781-790 (1979); Md. Ann. Code art. 78A, § 7A (1977), and Md. Exec. Order dated December 9, 1970 (Code of Maryland Register 01.01.1976.05), reprinted in 8A Fair Emp. Prac. Man. (BNA) 455:655; Mass. Exec. Orders Nos. 227 and 237, reported in 8A Fair Emp. Prac. Man. (BNA) 455:883-864, and Mass. Equal Employment Opportunity Anti-Discrimination and Affirmative Action Program (Admin. Ref. 75-14), reprinted in 8A Fair Emp. Prac. Man. (BNA) 455:961; Mich. Comp. Laws Ann. § 37.2210 (West 1985), Mich. Exec. Order 1981-4, reported in 8A Fair Emp. Prac. Man. (BNA) 455:8030, and Mich. Civil Rt. Dir. directive dated April 1978, reprinted in 8A Fair Emp. Prac. Man. (BNA) 455:1132; Minn. Stat. Ann. § 43A.19 (West Supp. 1985), and Minn. Dept. of Human Rights regulations, ch. 5000, reprinted in 8A Fair Emp. Prac. Man. (BNA) 455:1301; Miss. State Personnel Board Manual of Policies, Rules 5.30 et seq., reprinted in 8A Fair Emp. Prac. Man. (BNA) 455:1505; Mo. Exec. Order No. 82-27, reported in 8A Fair Emp. Prac. Man. (BNA) 455:1613, and Mo. Admin. Code (4 CSR) 100-3.000, reprinted in 8A Fair Emp. Prac. Man. (BNA) 455:1715; Mont. Exec. Order No. 24-81, reported in 8A Fair Emp. Prac. Man. (BNA) 455:1845; Neb. Rev. Stat. §§ 81-1155 et seq. (1981), and Neb. Exec. Order dated June 16, 1978, reported in 8A Fair Emp. Prac. Man. (BNA) 455:2048; Nev. Exec. Order dated February 22, 1983, reported in 8A Fair Emp. Prac. Man. (BNA) 455:2226; N.H. Exec. Order 81-1, reported in 8A Fair Emp. Prac. Man. (BNA) 455:2436, and N.H. State Plan for Equal Employment in Apprenticeship and Training, reprinted in 8A Fair Emp. Prac. Man. (BNA) 455:2571, 2581; N.J. Stat. Ann. § 10:5-31 (West 1976), N.J. Stat. Ann. §§ 11:3D-1 et seq. (West Supp. 1985), N.J. Exec. Order No. 61, reported in 3 Empl. Prac. Guide (CCH) ¶ 25,722; N.M. Exec. Order 81-05, reported in 8A Fair Emp. Prac. Man. (BNA) 455:2049, and N.M. Human Rts. Commission Regulations §§ XIII-XV, reprinted in 8A Fair Emp. Prac. Man. (BNA) 455:2080; N.Y. Exec. Law § 296 (12) (Consol. 1982), N.Y. Exec. Orders Nos. 6 and 21, reported in 8A Fair Emp. Prac. Man. (BNA) 455:3071-3073, and N.Y. Admin. Code tit. 9, § 866, reprinted in 8A Fair Emp. Prac. Man. (BNA) 455:3125; Ohio Rev. Code Ann. § 4112.04 (A)(10) (Baldwin Supp. 1979), Ohio Exec. Order dated September

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of Equal Opportunity, 69 Minn. L. Rev. 735, 802 (1985).

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11, 1973, reported in 3 Empl. Prac. Guide (CCH) ¶ 26,715, Ohio Dept. of State Personnel Rules and Regulations, ch. 123: 1-89-01 et seq., reprinted in 8A Fair Emp. Prac. Man. (BNA) 457:231, Ohio Bureau of Equal Employment Opportunity for Construction Regulations, ch. 123: 2-3-01 et seq., reprinted in 8A Fair Emp. Prac. Man. (BNA) 457:282, and Ohio State Apprenticeship Council rules 4301: 1-3-02 et seq., reprinted in 8A Fair Emp. Prac. Man. (BNA) 457:307; Okla. Stat. Ann. tit. 74, § 840.25 (West Supp. 1985), and Okla. Exec. Order No. 79-14, reported in 8A Fair Emp. Prac. Man. (BNA) 457:425; Or. Rev. Stat. §§ 182.900, 243.305, 243.315, and 659.025 (1983), Or. Exec. Order 79-22, reported in 8A Fair Emp. Prac. Man. (BNA) 457:509, and Or. Admin. R. 839-11-200, reprinted in 8A Fair Emp. Prac. Man. (BNA) 457:691; Pa. Exec. Order 1984-1, reported in 3 Empl. Prac. Guide (CCH) ¶ 27,251, Regulations of Penn. Human Relations Commission §§ 49.51 et seq., reprinted in 8A Fair Emp. Prac. Man. (BNA) 457:809, Regulations of Penn. Dept. of Labor and Industry, Industrial Board, §§ 81.1 et seq., reprinted in 8A Fair Emp. Prac. Man. (BNA) 457:935, Affirmative Action Guidelines of the Penn. Human Relations Commission, reprinted in 8A Fair Emp. Prac. Man. (BNA) 457:851, and Penn. Employee Selection Guidelines § 15 (1 Pa. Admin. B-8, 2359 (1971)), reprinted in 8A Fair Emp. Prac. Man. (BNA) 457:861; R.I. Exec. Order 85-11, reprinted in 8A Fair Emp. Prac. Man. (BNA) 457:1245; S.C. Code Ann. § 1-13-110 (Law. Co-op. Supp. 1984), and S.D. Admin. R. 65-30 et seq., reprinted in 8A Fair Emp. Prac. Man. (BNA) 457:1451; Tenn. Code Ann. § 4-21-306 (1985), and Tenn. Exec. Order No. 8, reported in 8A Fair Emp. Prac. Man. (BNA) 457:1865; Tex. Exec. Order MW-4, reported in 8A Fair Emp. Prac. Man. (BNA) 457:2007; Utah Exec. Order dated Mar. 4, 1979, reported in 8A Fair Emp. Prac. Man. (BNA) 457:2218; Va. Exec. Order No. 1-82, reported in 8A Fair Emp. Prac. Man. (BNA) 457:2635; Wash. Exec. Order No. 84-03, reported in 8A Fair Emp. Prac. Man. (BNA) 457:2826, Wash. Rev. Code §§ 49.04.010-49.04.130 (1974), reprinted in 8A Fair Emp. Prac. Man. (BNA) 457:2871, Wash. Admin. Code R. 368-08-270(4)(g), reprinted in 8A Fair Emp. Prac. Man. (BNA) 457:2912, Wash. Admin. Code R. 368-10-030 - 368-10-100, reprinted in 8A Fair Emp. Prac. Man. (BNA) 457:2935a, and Wash. Admin. Code R. 296-01-370 - 296-01-400, reprinted in 8A Fair Emp. Prac. Man. (BNA) 457:2970; W. Va. Exec. Order 86-78, reported in 8A Fair Emp. Prac. Man. (BNA) 457:3036; Wis. Stat. Ann. §§ 16.765 and 111.321 et seq. (West Supp. 1985), and Wis. Exec. Orders Nos. 9, 56, and 58, reported in 8A Fair Emp. Prac. Man. (BNA) 457:3217-3218.

> "Affirmative action programs have achieved the opening of jobs for blacks at other than menial levels and the creation of an appreciable black middle class. . . .
>
> "Two studies released in 1982 concluded that blacks made 'greater gains in employment at those establishments contracting with the federal government—and thus subject to the OFCCP affirmative action requirements—than at non-contractor companies.' Major corporations . . . reported significant employment gains for minorities under affirmative action programs. Evidence of even greater importance is a 1982 survey on affirmative action. In it, a number of major corporations reported that affirmative action had helped break down racial stereotypes, improved employee morale, streamlined personnel policies, and, at some companies, even expanded business. A concerted effort by the courts and administrative agencies to achieve affirmative action goals has contributed to these successes. Affirmative action programs have begun to achieve the goal of equal opportunities for all." *Id.*, at 408-409 (footnotes omitted).

As further documented in Edwards, *Professional Remedies and Affirmative Action in Employment in the Wake of Bakke*, 1979 Wash. U. L.Q. 113, 134 (1979), "professional remedies do work."

Judicial decisions reviewing affirmative action programs have similarly concluded that such programs are effective means to eliminate vestiges of discrimination, and, moreover, necessary to achieve that goal. As Justice Blackmun stated in his separate opinion in *Bakke*:

> "In order to get beyond racism, we must first take account of race. There is no other way." 438 U.S., at 407 (Blackmun, J., concurring and dissenting).

These sentiments were recently echoed in *United States v. City of Buffalo*, — F.2d —, — (2d Cir. Dec. 19, 1983), where the court said:

> "[W]here prospective relief was available the wrong could not, because of the inability to identify each of the victims, be remedied by 'make-whole' relief.
>
> . . .
>
> "[B]road discriminatory conduct demands equally broad prospective equitable relief. Otherwise the wrong will not be remedied."[26]

Of course in remedying any wrong, the remedy should only extend so far as necessary to reach the desired goal, and both Title VII and the equal protection guarantee require that affirmative action plans be appropriately limited so that full equality is achieved, but a new discriminatory system is not established. The Title VII guidelines set forth in *Weber*, 443 U.S. at 208, require that affirmative action plans be "designed to break down

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26. Many other decisions have also discussed the necessity for according racial preferences to undo past discrimination's effects, including *Johnson v. Transportation Agency, Santa Clara County*, 770 F.2d 752, 759 (9th Cir. 1985) ("Affirmative action is necessary . . . to remedy long-standing imbalances in the work force."); *Thompson v. Sawyer*, 678 F.2d 257, 294 (D.C. Cir. 1982) ("There may be situations in which the correct or a goal, or the stick or a required minimum, is necessary to encourage a dilatory or obstructive employer to end discrimination."); *Valentine v. Smith*, 654 F.2d 503, 509 (8th Cir. 1981), cert. denied, 454 U.S. 1124 (1981) ("Arkansas could not practically achieve its constitutionally permissible ends in the foreseeable future without the use of race-conscious remedies."); and *United States v. City of Miami*, 614 F.2d 1322, 1336 (5th Cir. 1980), mod. on other grds., 664 F.2d 435 (5th Cir. 1981) ("[A]ffirmative relief is required to ensure that the effects of past discrimination are negated.") (emphasis in original).

old patterns of racial segregation and hierarchy," "not unnecessarily trammel the interests of the white employees," not "create an absolute bar to the advancement of white employees," and be "a temporary measure."

The necessity for limiting affirmative action plans so as only to remedy past discrimination was also set forth in *Fullilove*. The opinion by Chief Justice Burger announcing the judgment of the Court, 448 U.S. at 482, noted that "application of racial or ethnic criteria will be limited to accomplishing the remedial objectives of Congress." See also the concurring opinion of Justice Powell, at 496 ("[T]he means selected must be narrowly drawn to fulfill the governmental purpose."), and Justice Marshall, at 521 ("[R]acial classifications employed in the set-aside provision are substantially related to the achievement of the important and congressionally articulated goal of remedying the present effects of past racial discrimination.").

•

With appropriate limitations, such as were found to exist in both decisions under review herein,[17] race-conscious plans which operate prospectively, and help ensure that the remnants of past discrimination do not continue to haunt the work force, are an essential tool in the Nation's struggle to eradicate employment discrimination. In *Setser v. Novack Investment Co.*, 638 F.2d 962, 966 n.1 (6th Cir. 1981) (en banc), cert. denied, 454 U.S. 1054 (1981), the court, quoting from a 1977 statement by the United States Commission on Civil Rights, provided a

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17. See *Vanguards*, 753 F.2d at 484-485, *and Local* 638 *Local* 28, 753 F.2d at 1586-1588, for discussions of how the affirmative action plans in question in each case comply with the guidelines set forth above.

most compelling and persuasive justification for affirmative action:

> "'The short history of affirmative action programs has shown such programs to be promising instruments in obtaining equality of opportunity. Many thousands of people have been afforded opportunities to develop their talents fully—opportunities that would not have been available without affirmative action. The emerging cadre of able minority and women lawyers, doctors, construction workers, and office managers is testimony to the fact that when opportunities are provided they will be used to the fullest.
>
> 'While the effort often poses hard choices, courts and public agencies have shown themselves to be sensitive to the need to protect the legitimate interests and expectations of white workers and students and the interests of employers and universities in preserving systems based on merit. While all problems have not been resolved, the means are at hand to create employment and education systems that are fair to all people.
>
> 'It would be a tragedy if this nation repeated the error that was made a century ago. If we do not have our nerve and commitment and if we fail to use the reservoir of good will that exists in this nation, affirmative action programs will help us to reach the day when our society is truly colorblind and nonsexist because all people will have an equal opportunity to develop their full potential and to share in the effort and the rewards that such development brings.'
>
> United States Comm. on Civil Rights, Statement on Affirmative Action, 12 (1977)."

These words eloquently describe the importance of a decision from this Court affirming the use of bona fide affirmative action plans, in appropriate situations, to accomplish the goal of eliminating the effects of past discrimination.

CONCLUSION

Race-conscious affirmative action plans designed to eliminate the vestiges of racial discrimination in employment are an effective and necessary means to achieve the goal of equal employment opportunity. Such plans are consistent with the remedial purpose of Title VII, and pass scrutiny under equal protection guarantees, so long as they are carefully designed to remedy past discrimination. For the foregoing reasons, amici respectfully urge this Court to affirm the decisions below.

DATED: January 24, 1986

Respectfully submitted,

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AMICUS CURIAE

BRIEF

SUPREME COURT, U.S.
FILED
JAN 21 1986
JOSEPH F. SPANIOL, JR.

No. 84-1999

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, C.L.C.,
Petitioner,

v.

CITY OF CLEVELAND, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

The Equal Employment Advisory Council ("EEAC") respectfully submits this brief amicus curiae, pursuant to the written consents of the parties.[1]

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership consists of a broad cro-

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[1] Their consents have been filed with the Clerk of the Court.

ment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity (EEO) whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially all of EEAC's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e, *et seq.*), as well as other equal employment statutes and regulations. In addition, nearly all of EEAC's members are subject to the affirmative action requirements under Executive Order 11246, 30 Fed. Reg. 12319 (1965), as amended by 32 Fed. Reg. 14303 (1967) and 43 Fed. Reg. 46501 (1978). Finally, many of EEAC's members are signatories to collective bargaining agreements, Title VII settlements, conciliation agreements, consent decrees and other voluntary plans or programs which provide varying forms of remedial relief or affirmative action benefiting persons or groups covered by Title VII and other federal and state equal employment statutes, regulations and orders.

Most of EEAC's member representatives are charged with corporate responsibility for compliance with federal, state and local nondiscrimination laws. As equal employment officers, they must attempt to determine not only their companies' nondiscrimination and affirmative action obligations, but also the nature and extent of any remedial relief which may be necessary, as well as the potential liability which these obligations might create to nonminority employees and applicants.

EEAC's members are concerned about the potential impact that this Court's decision could have on the ability

of employers to respond practically and responsibly to allegations that minorities or women may be underrepresented in their workforces. Whether or not such underrepresentation is caused by the employer's discrimination, it makes employers potential targets of discrimination suits filed by members of protected groups or by federal and state equal employment enforcement agencies. Such suits often are framed broadly, and the scope of the employer's potential liability may be difficult to ascertain prior to class certification hearings, discovery, trial on the merits, or post-trial remedial proceedings. Consequently, employers often face the practical necessity of exploring ways to avoid such suits, either through settlements or consent decrees, or by voluntary affirmative action to eliminate such underrepresentation.

Employers are concerned that a decision in this case could limit unduly their flexibility in avoiding or resolving discrimination claims, particularly in light of this Court's decision in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). EEAC members would view with great concern any limitation on the ability of employers to adopt voluntary policies, either through consent decrees or otherwise, consistent with *Weber* and designed to eliminate a workforce underutilization of protected group members. At the same time, it is clear from *Weber* that, absent a finding of discrimination, race-based preferential treatment cannot be required of employers who do not wish voluntarily to adopt such policies. Accordingly, EEAC members have a direct interest in the issue involved in this case, *i.e.*, whether Title VII limits the relief contained in a voluntary consent decree to identified victims of discrimination.

Because of its interest in such issues, EEAC has participated in numerous other cases involving issues relating to the nature and scope of the equal employment and affirmative action obligations of employers. *See, e.g., Wygant v. Jackson Board of Education*, No. 84-1340;

Firefighters Local Union No. 1784 v. Stotts, 104 S.Ct. 2576 (1984); *Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP*, 103 S. Ct. 2076 (1983); *Miasick v. California Dept. of Corrections*, 452 U.S. 105 (1981); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979); *County of Los Angeles v. Davis*, 440 U.S. 625 (1979); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

In an effort to assist the Court in resolving the important issues involved in this case, as well as in *Local 28 v. Equal Employment Opportunity Commission*, No. 84-1656, EEAC will address in this brief what it believes to be the permissible scope of affirmative action relief available under Title VII. In doing so, EEAC will address the limitations, if any, that Section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g), places on the authority of a court to order relief after a trial on the merits, as well as on its authority to approve and implement relief contained in a voluntary consent decree.

STATEMENT OF THE CASE

This case involves a challenge to the entry by a federal district court judge of a consent decree designed to increase the number of Black and Hispanic officers in the Cleveland Fire Department. Because the decree contained relief designed to benefit persons who themselves had not been shown to be the identified victims of unlawful discrimination, this case raises the important issue of whether Section 706(g) of Title VII prohibits the courts from approving a consent decree that may contain relief for non-identified victims.

In 1980, the Vanguards of Cleveland, an association of Black and Hispanic firefighters, filed a class action lawsuit in the United States District Court for the Northern District of Ohio alleging that the City of Cleveland

discriminated against Blacks and Hispanics in promotional opportunities.[1] The complaint alleged that only 4.3% of the firefighters at the rank of Lieutenant or above were minorities.

In 1981, the petitioner Local 93, International Association of Firefighters (Local 93), the collective bargaining representative for Cleveland firefighters, sought to and was allowed to intervene in the suit. The complaint in intervention filed by Local 93 opposed promotions based on any criteria other than competence, "such as a racial quota system."

Beginning shortly after the suit was filed, the City and the Vanguards (later joined by Local 93) engaged in negotiations designed to resolve the issues raised in the suit. In November 1981, the City and the Vanguards submitted a proposed consent decree to the district court. Stipulations filed at that time indicated that the percentage of minority residents of the City in 1980 was 46.9%, whereas the percentage of minority firefighters in the rank of Lieutenant or above was 4.5%. *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479, 482 (6th Cir. 1985). Local 93 objected to the proposed decree.

Following a series of hearings before the district judge, the court referred the issue to a magistrate for further negotiations. A tentative agreement among all parties on a consent decree was rejected by the members of Local 93. At that point, the City and the Vanguards submitted a proposed consent decree to the district court for approval.

The affirmative action provisions contained in the decree provided that 50% of sixty-six promotions to the rank of Lieutenant would go to minorities. Pet. App. at A34. A second stage of the decree provided for pro-

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[1] The complaint alleged violations of the Thirteenth and Fourteenth Amendments, 42 U.S.C. §§ 1981 and 1983, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*

motional goals for various promotional positions ranging from 10% to 25%. *Id.* at 35-36. Local 93 filed a formal objection to the use of racial preferences in the decree. In January 1983, the District Court (Lambros, J.), in an unreported opinion, approved the decree.

A divided Sixth Circuit panel, in an opinion reported at 753 F.2d 479 (6th Cir. 1985), affirmed the lower court's approval of the decree. The court set forth the following standards for determining whether affirmative relief contained in a consent decree was appropriate:

> A consent decree may not embody an affirmative action plan unless the employer has utilized minorities at a rate less than their proportion in the relevant labor market. The plan itself cannot require the discharge of non-minority workers and their replacement with minorities. The plan also cannot create an absolute bar to the advancement of non-minority employees. Finally, the decree must be temporary in nature and must terminate when the underutilization of minorities has been corrected. *Id.* at 484. (Citations and footnote omitted).

With regard to the effect which this Court's decision in *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984), may have had on the legality of the relief contained in the decree, the Sixth Circuit panel concluded "that *Stotts* has no effect on this case." *Id.* at 486. The court distinguished *Stotts* on the ground that "the City of Cleveland has agreed to the plan adopted in this case." *Id.* In doing so, the court noted that "[t]he fact that this case involves a consent decree and not an injunction makes the legal basis of the *Stotts* decision inapplicable." *Id.* In addition, the court stated that neither Section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g), nor its legislative history "address what action an employer may take voluntarily." *Id.* at 487.

The court also observed that this Court's decision in *Stotts* must be read in light of *United Steelworkers of*

America v. Weber, 443 U.S. 193 (1979), which establishes standards for permissible voluntary affirmative action. Noting the important distinction between voluntary and coercive affirmative action efforts, the Sixth Circuit panel stated that:

> In *Stotts*, the decree was essentially coercive and consensual in name only. Accordingly, the Court did not analyze the case as involving voluntary action. In the present case, the decree reflects voluntary action and must be analyzed as a voluntary action case. *Id.* at 489. (Footnote omitted).

Judge Kennedy dissented from the panel opinion on the ground that the case "should be governed by the principles applicable to court-ordered relief rather than those applicable to purely voluntary actions." *Id.* Thus, Judge Kennedy would have held that the lower court erred in approving the consent decree, since the decree, in her view, contained relief in excess of that available under Title VII.

SUMMARY OF ARGUMENT

This case affords an opportunity for the Court to provide much-needed guidance concerning the legal limits of affirmative action under Title VII. Ever since the Court issued its decision in *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984), government civil rights officials, lower federal courts, and other legal authorities have differed sharply over the implications for affirmative action of the Court's discussion of Section 706(g) of Title VII and its policy limiting relief under that statute to identified victims of discrimination.

The position of the amicus curiae, EEAC, is that the "identified victims" limitation contained in Section 706 (g) applies only to coercive court orders not agreed to by the parties, and does not apply to *voluntary* affirmative action programs that have been adopted by employers either independently or as part of a settlement agree-

ment, even if those programs are incorporated in a consent decree and submitted to a court for approval. Voluntary affirmative action agreements are governed instead by the standards set forth in this Court's decision in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

The *Stotts* decision dictates that remedial relief ordered by a court following trial on the merits of a Title VII action may be awarded only to identified victims of unlawful discrimination by the defendant employer. Because the Court read Section 706(g) as a fundamental limitation on the courts' remedial authority under Title VII, it follows that this limitation must apply to all forms of relief that may be ordered without the employer's voluntary consent.

There is no indication, however, either on the face of Section 706(g) or in its legislative history, that Congress meant this limitation to apply to affirmative remedial measures agreed to voluntarily by the parties to a Title VII action. To the contrary, Congress clearly intended that the parties be given substantial flexibility to resolve claims of discrimination voluntarily. Accordingly, when the employer and the party claiming to be aggrieved are able to agree upon terms of a settlement, the scope and legality of the relief agreed upon are governed not by Section 706(g), but by the *Weber* standards. This remains true when the relief is contained in a voluntary consent decree and is submitted to a federal court for approval and entry.

A contrary rule which would bar the parties to a consent decree from adopting affirmative remedial measures other than relief for identified victims of discrimination would thwart the clearly expressed policy of Title VII favoring voluntary settlements, since it is often impracticable or impossible to identify individual victims of discrimination until after trial on the merits. Thus, such

a rule would be directly at odds with Congress's determination that settlement, rather than litigation, is the preferred method of resolving employment discrimination claims.

ARGUMENT

I. VOLUNTARY AFFIRMATIVE ACTION RELIEF, EVEN IF INCORPORATED IN A CONSENT DECREE, IS GOVERNED BY THE STANDARDS SET FORTH IN THIS COURT'S DECISION IN *WEBER*, NOT BY THE "IDENTIFIED VICTIMS" LIMITATIONS CONTAINED IN SECTION 706(G) OF TITLE VII.

This Court's decision in *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984), established that Section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g),[*] places certain limitations on the relief that a court can order under Title VII. Thus, the instant case will require the Court to determine whether the "identified victims" limitation of Section 706(g), as interpreted in *Stotts*, applies only to *coercive* orders of a court not agreed to by the parties or also to *voluntary* affirmative action provisions that may be incorporated in a consent decree and submitted to a court for approval.

EEAC submits that the "identified victims" limitation in Section 706(g) applies only where an order of a court seeks to *impose* affirmative action relief over the objection of an employer (such as after a trial or other determination on the merits). On the other hand, when affirmative action provisions have been agreed to *voluntarily* by the

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[*] Section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g), provides in part that:

> No order of the court shall *require* the . . . reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual . . . was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin (emphasis added).

parties, relief need not necessarily be limited to identified victims, even where that relief is incorporated in a consent decree. Where such relief is agreed to *voluntarily*, it need only be consistent with the standards established by this Court in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).[6]

A. Where A Court Orders Post-Trial Affirmative Action Relief Not Agreed To By The Employer, Section 706(g) of Title VII Requires That Relief Be Limited To Identifiable Victims.

In *Stotts*, this Court held that a lower court exceeded its authority in overriding a bona fide "last-hired, first-fired" seniority system in order to preserve minority employment gains under a previously entered consent decree. In doing so, the Court had occasion to discuss the text and legislative history of Section 706(g) of Title VII, as well as prior decisions of this Court addressing the appropriate scope of relief that a court may order under Title VII. That discussion made clear that Section 706

[6] It is important to highlight a number of issues that specifically are *not* addressed herein. First, EEAC expresses no views on whether the particular affirmative action provisions contained in the consent decree herein are lawful. Specifically, EEAC does not address the issue of whether this Court's decision in *Weber* applies to public employers and, if so, whether the *Weber* standards were met in this case. (In *Stotts*, 104 S.Ct. at 2590, this Court cautioned that "[w]hether the City, a public employer, could have [unilaterally adopted an affirmative action program] without violating the law is an issue we need not decide.") EEAC also does not address the extent to which the Constitution might affect the relief which the City, a public employer, could agree to in the consent decree.

Second, EEAC does not address the issue of whether the lawfulness of the relief herein is affected by the fact that it involved promotional opportunities, and not entry level positions.

Finally, EEAC takes no position on the effect which Local 93's objection to the consent decree had on the lawfulness of the entry of the decree by the district court, nor on the effect which any admissions or finding of discrimination in the decree or in the order approving it may have had.

(g) operates to limit the coercive relief that a court may *order* (such as after a trial or other determination on the merits) to relief for identified victims, where such relief is opposed by the employer or other party against whom the relief is sought.

Stotts involved a challenge to a court order which effectively prohibited the Memphis Fire Department from laying off minority employees in accordance with a bona fide seniority system. The order modified the terms of a previously entered consent decree and had the effect of granting preferences to persons who themselves had not been identified as victims of discrimination. The City of Memphis opposed the changes to its established "last-hired, first-fired" seniority system.

In reversing the lower court decisions in *Stotts*, it is clear that this Court intended to define certain limitations on a court's authority or power under Title VII. For example, the majority opinion stated that "[t]he issue at the heart of this case is whether the District Court exceeded its powers in entering an *injunction requiring* white employees to be laid off." 104 S. Ct. at 2585. (Emphasis added and footnotes omitted). In addition, the majority opinion stated, that an identified victims standard "is consistent with the policy behind § 706(g) of Title VII, which affects the *remedies available in Title VII litigation*." *Id.* at 2588-89. (Emphasis added). Finally, the Court cited a number of statements from the legislative history of Section 706(g) which it read as making "clear that a court was not authorized to give preferential treatment to non-victims," *id.* at 2589, and as establishing "limits on a court's authority." *Id.* Thus, it is clear that the decision in *Stotts* represents an acknowledgment of certain limitations on the remedial authority of a court under Title VII.[7]

[7] Justice O'Connor's concurring opinion is in accord with the majority view that Section 706(g) places limitations on a court's remedial authority. For example, Justice O'Connor stated that "a

The Court in *Stotts* addressed and rejected the argument that the lower court's unilateral modification of the consent decree was no more than the lower court could have done if the allegations in the complaint were actually proved. In doing so, the Court noted that:

> The difficulty with this approach is that it overstates the authority of the trial court to disregard a seniority system in fashioning a remedy *after a plaintiff has successfully proved* that an employer has followed a pattern or practice having a discriminatory effect on black applicants or employees. If individual members of a plaintiff class *demonstrate* that they have been actual victims of the discriminatory practice, they may be awarded competitive seniority and given their rightful place on the seniority roster. This much is clear from *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976) and *Teamsters v. United States*, 431 U.S. 324 (1977). *Teamsters*, however, also made clear that mere membership in the disadvantaged class is insufficient to warrant a seniority award; each individual must *prove* that the discriminatory practice had an impact on him. *Id.* at 2588. (Emphasis added; citations omitted).

Accordingly, the Court concluded that:

> It therefore seems to us that in light of *Teamsters*, the Court of Appeals *imposed* on the parties as an adjunct of settlement something that could not have been ordered had the case gone to trial and the

court may use its remedial powers . . . *only* to prevent future violations and to compensate identified victims of unlawful discrimination." *Id.* at 2593. (Emphasis added). In addition, Justice O'Connor stated that relief under Title VII is "properly reserved *for only* identified victims." *Id.* (Emphasis added.) Justice Stevens' opinion, concurring in the judgment, also acknowledges that "[Section 706(g)] . . . *define[s] the limits of appropriate relief for a Title VII violation.*" *Id.* at 2594-95 n.3. (Emphasis added.)

> plaintiffs proved that a pattern or practice of discrimination existed. *Id.* (Emphasis added).[6]

After reviewing the legislative history, the Court concluded that "[t]he Court of Appeals holding that the District Court's order was permissible as a valid Title VII remedial order ignores not only our ruling in *Teamsters* but the policy behind § 706(g) as well." *Id.* at 2590.[7]

Thus, it is clear that this Court's decision in *Stotts* merely represented an extension and explanation of its earlier rulings in *Teamsters* and *Franks* that in a coercive, non-consensual action under Title VII, a court has authority to award relief only to identified victims of discrimination. Because the underlying basis of the Court's

[6] The Court quoted numerous passages from the 1964 legislative history as indications that Section 706(g) limits coercive relief to identified victims. For example, Senator Humphrey, a leading proponent of the bill that became Title VII, stated that:

> No court order can *require* hiring, reinstatement . . . or payment of back pay for anyone who was not fired, refused employment or advancement . . . by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of Section [706(g)] . . . Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to *require* hiring, firing, or promotion of employees in order to meet a racial "quota" or to achieve a certain racial balance. *Id.* at 2589, *quoting* 110 Cong. Rec. 6549 (1964). (Emphasis added). *See also id., quoting* 110 Cong. Rec. at 6566 (1964).

[7] Justice O'Connor, in her concurring opinion, agreed that Section 706(g) contained limitations on a court's authority to order relief for non-victims of discrimination. She noted in her opinion that:

> A court may not grant preferential treatment to any individual or group simply because the group to which they belong is adversely affected by a bona fide seniority system. Rather, a court may use its remedial powers, including its power to modify a consent decree, *only* to prevent future violations and to compensate identified victims of unlawful discrimination. *Id.* at 2593. (Emphasis added).

decision rests on fundamental limitations on a court's authority under Title VII, it is clear that such limitations apply to all forms of relief that may be *imposed* where the employer does not voluntarily agree to the relief. As explained below, however, where an employer *voluntarily* agrees to affirmative relief, different standards govern.

B. Where Private Parties Voluntarily Agree To Affirmative Action Relief, The Standards Of *Weber* Apply, Even Where Such Relief is Contained In A Consent Decree.

As noted above, following a contested trial on the merits, a court has no authority under Title VII to provide relief to persons who are not identified victims of discrimination. It is critical, however, to draw a distinction between *coercive* orders of a court over the objection of an employer and *voluntary* affirmative action provisions that may be incorporated in a consent decree and submitted to a court for approval and entry.

Where the employer and an aggrieved party or parties are able to agree voluntarily to relief, the scope and legality of such relief should be measured by this Court's decision in *Weber* and not by the limitations imposed by Section 706(g). This is true even where the relief is contained in a voluntary consent decree and is submitted to a federal court for approval and entry.

Initially, it does not appear that Section 706(g) on its face or its legislative history even addresses the scope of relief available where the parties *voluntarily* agree to affirmative relief. Section 706(g) provides in pertinent part that:

> *If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint*, the court may enjoin the respondent from engaging in such unlawful employment practice, and

> order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate . . . No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title. (Emphasis added).

Thus, on its face, Section 706(g) would appear to address only what a court can order where it "finds that the respondent has . . . engaged in . . . an unlawful employment practice charged in the complaint."

If this is a correct reading of Section 706(g), the last sentence of Section 706(g), relied on by this Court in ascertaining an "identifiable victims" standard in *Stotts*, applies only to cases tried by the court and after a finding of discrimination. Since consent decrees are entered into voluntarily and normally without any finding of discrimination by the court (or even an admission of a violation by the defendant), the identified victims limitation contained in Section 706(g) simply is inapplicable in most cases involving consent decrees.

The legislative history of Section 706(g), relied upon by this Court in *Stotts*, is consistent with this reading of Section 706(g). For example, the House Memorandum relied upon by this Court in *Stotts* stated:

> *Upon conclusion of the trial*, the federal court may enjoin an employer or labor organization from practicing further discrimination and may order the hiring or reinstatement of an employee or the acceptance or reinstatement of a union member. But Title

> VII does not permit the ordering of racial quotas in business or unions . . . ." 110 Cong. Rec. at 6566 (emphasis added and emphasis of the Court omitted), *cited at* 104 S. Ct. at 2589.

Similarly, the bi-partisan newsletter of the principal Senate sponsors, cited by the Court in *Stotts*, 104 S. Ct. at 2590, stated that "[u]nder title VII, not even a Court . . . could order racial quotas or the hiring, reinstatement, admission to membership or payment of back pay for anyone who is not discriminated against *in violation of this title*." 110 Cong. Rec. at 14465. (Emphasis added). *See also* the Clark-Case Interpretative Memorandum, 110 Cong. Rec. at 7214, *cited at* 104 S.Ct. at 2589 ("No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not discriminated against *in violation of [Title VII]*."). (Emphasis added). Thus, it appears that the legislative history addresses only the limitations on a court's authority to order relief "upon conclusion of the trial" or where a "violation of [Title VII]" has occurred. Nowhere do these legislative history passages address any limitations on what relief a court may approve, where that relief is agreed to *voluntarily* by the parties.

Thus, the "policy behind Section 706(g)," 104 S. Ct. at 2590, of awarding relief only to identified victims, applies only where there has been a trial or other determination on the merits in a contested action and a finding of a violation of the Act. There is no similar discernible "policy" evidenced in Section 706(g) with regard to actions involving voluntary consent decrees.

This Court's discussion in *Stotts* of *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961), is not to the contrary. In *Stotts*, the Court discussed the authority of the lower courts to *modify* a consent decree *over the objection of the employer*. The *Stotts* opinion noted that "the District Court's authority to *impose* a modification of a decree is not wholly dependent on the decree." 104

S. Ct. at 2587 n.9 (Emphasis added). As support for this proposition, the Court, quoting from *System Federation No. 91*, 364 U.S. at 651, stated that "'[t]he District's [sic] Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce,' not from the parties' consent to the decree." Accordingly, the Court stated that "a district court cannot enter a *disputed* modification of a consent decree in Title VII litigation if the resulting order is inconsistent with that statute." *Id.* (Emphasis added).

Since the modification at issue in *Stotts* was disputed by the City, the relief requested was not consensual but was coercive, and the only way the disputed modification could have been accomplished was by resolving the issue of individual victims on the merits. As noted above, Section 706(g) by its terms and legislative history dictates that relief in such contested cases may be awarded only to persons who have been identified as victims, which the lower courts in *Stotts* had not done. Thus, this Court stated that:

> Title VII necessarily acted as a limit on the District Court's authority to modify the decree *over the objections of the City*; the issue cannot be resolved solely by reference to the terms of the decree and notions of equity. Since . . . Title VII precludes a district court from displacing a non-minority employee with seniority under the contractually established seniority system absent either a *finding* that the seniority system was adopted with discriminatory intent or a *determination* that such a remedy was necessary to make whole a *proven* victim of discrimination, the District Court was precluded from granting such relief *over the City's objection* in this case. *Id.* (Emphasis added).

Thus, Section 706(g) and this Court's decision in *Stotts* offer guidance *only* where the relief at issue is *disputed* by the employer or other party on whom such relief would be *imposed*. Where the parties do not agree on

such relief, the "policy" of Section 706(g) of providing relief only to identified victims requires that any persons benefited by the court's order be determined to be actual victims of discrimination.

On the other hand, where there is voluntary agreement by the employer and a plaintiff or group of plaintiffs to the relief, the identified victims "policy" of Section 706(g) places no limits on the authority of the court to approve such voluntary, consensual relief. Rather, in such instances, the only limits on the court's ability to approve such relief is adherence to the "policy" set forth by this Court in *Weber*[*] for determining whether private, voluntary affirmative action measures are lawful.

The lower courts after *Stotts* have held unanimously that neither Section 706(g) nor *Stotts* affects the authority of a court to approve a consent decree that may contain relief for persons not identified as victims of discrimination. Illustrative of these decisions is the opinion of the Sixth Circuit in the instant case, which in discussing Section 706(g), stated that:

> By its very terms, this section provides a limit only on a court's power to award relief. It does not forbid an employer from engaging in certain actions but rather limits what an employer may be forced to do so. 753 F.2d at 487.

The Sixth Circuit also noted that:

> In *Stotts*, the decree was essentially coercive and consensual in name only. Accordingly, the Court did

[*] In *Weber*, 443 U.S. at 208-09, this Court held that Title VII does not prohibit private, voluntary race-conscious affirmative action efforts that were designed to eliminate a manifest imbalance in an employer's workforce, were temporary in nature and did not unnecessarily trammel the interests of non-minority employees. As noted earlier, EEAC takes no position on whether *Weber* applies to public employers and, if so, whether its standards were met in the instant case.

> not analyze the case as involving voluntary action. In the present case, the decree reflects voluntary action and must be analyzed as a voluntary action case. *Id.* at 489. (Footnote omitted).[*]

Similarly, in *Turner v. Orr*, 759 F.2d 817, 824 (11th Cir. 1985), the Eleventh Circuit noted that:

> [T]he most significant factor distinguishing this case from *Stotts* is that the consent judgment here was voluntarily entered into by the parties. In *Stotts*, the city objected to the modified decree which was before the Supreme Court. *Stotts* therefore dealt with the power of a court to modify a consent judgment over the objection of one of the parties.

Other courts also have stressed the important distinction between voluntary and coercive actions in distinguishing *Stotts*. *See, e.g., Paradise v. Prescott*, 767 F.2d 1514, 1529-30 (11th Cir. 1985); *Devereux v. Geary*, 765 F.2d 268, 273 (1st Cir. 1985).

Even if this Court holds that the identified victims "policy" of Section 706(g) is not limited to contested cases, it is not at all clear that that necessarily would dictate that relief contained in a consent decree would be governed by that policy. For example, this Court stated in *United States v. ITT Continental Baking Company*, 420 U.S. 223, 236-37 (1975), that "since consent decrees and orders have many of the attributes of ordinary contracts, they should be construed basically as contracts, without reference to the legislation the Government originally sought to enforce but never proved applicable through litigation." (Footnote omitted.) This Court and lower courts have recognized that relief con-

[*] The Sixth Circuit in the instant case correctly noted that both *Teamsters* and *Fresh*, relied upon by this Court in *Stotts*, "concerned only the remedial powers of a court in a coercive action" and "[n]either case considered the power of an employer to implement voluntarily a hiring or promotion plan." *Id.* at 487 n.6.

tained in a consent decree may go beyond that authorized by a statute. *See, e.g., Swift & Co. v. United States*, 276 U.S. 311, 328-30 (1928); *Save Our Committee by Cook v. Lynn*, 735 F.2d 1535, 1538 (3d Cir.), *cert. denied*, 105 S.Ct. 431 (1984); *Citizens For A Better Environment v. Gorsuch*, 718 F.2d 1117, 1124-25 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 2668 (1984); *Larsen v. Sielaff*, 702 F.2d 116, 118 (7th Cir.), *cert. denied*, 464 U.S. 956 (1983).

Thus, even if the Section 706(g) identified victims "policy" has a broader application than merely determinations on contested issues, the above-quoted cases would seem to dictate that a voluntary agreement, even if incorporated in a consent decree, is not an "order" within the meaning of Section 706(g). Rather, the approval of such voluntary relief should be treated merely as the approval of a "contract" between the parties, subject again only to the limitations contained in *Weber*.

Thus, it is clear that while Section 706(g) of Title VII, as interpreted by this Court in *Stotts*, imposes limitations on a court's authority to order relief in a coercive context and over the objection of the employer for persons not identified as victims, no such limitation applies where the relief is agreed to voluntarily. Rather, in such instances, the only limitations on the relief that may be approved are contained in this Court's decision in *Weber*.

II. IMPORTANT POLICY REASONS MILITATE AGAINST APPLYING AN IDENTIFIED VICTIMS LIMITATION TO VOLUNTARY RELIEF CONTAINED IN CONSENT DECREES.

As noted above, the identified victims limitation contained in Section 706(g), on its face, applies only to relief ordered in a coercive, non-consensual context. In addition to the fact that Section 706(g) does not itself address or limit the proper scope of relief available in a voluntary consent decree, there are sound policy reasons

why a strict identified victims standard should not be required in the voluntary context.

A. Application Of A *Weber* Standard To Voluntary Decrees Is Consistent With Policies Favoring Voluntary Resolution Of Employment Discrimination Claims.

Following this Court's decision in *Weber*, a substantial number of private employers have entered into various forms of voluntary affirmative action agreements or plans, including consent decrees. The flexibility provided to employers by *Weber* serves a number of important purposes that are consistent with the objectives underlying Title VII. First, such voluntary plans or programs are consistent with the notion, long recognized by the courts, that voluntary compliance is the preferred means of eliminating employment discrimination. *See, e.g., W.R. Grace & Co. v. Local 759*, 461 U.S. 757, 770-71 (1983); *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982); *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981); *Weber*, 443 U.S. at 203-04; *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). In addition, these voluntary plans are consistent with the principles under Title VII that employers are required to "'. . . self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges' of their discriminatory practices." *Teamsters*, 431 U.S. at 364, *quoting Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975).

B. *Weber* Has Enabled Employers To Respond Practically And Responsibly To Claims That Minorities Or Women Are Underrepresented In Their Workforces.

A second practical effect of *Weber* is that it has enabled employers, if they choose, to respond practically and responsibly to concerns that minorities and women may be underrepresented in their workforces. Whether

or not such underrepresentation may have been caused by an employer's discrimination, it makes employers potential targets of persons protected by Title VII (and other state and federal equal employment statutes and regulations), or of federal or state equal employment enforcement agencies. Thus, employers often may be faced with the practical need to attempt to avoid such suits through the adoption and implementation of voluntary affirmative action plans.

The dilemma faced by employers in attempting to take affirmative steps to assure equal employment opportunity without unnecessarily interfering with the employment rights and opportunities of non-minority employees has been recognized by a number of courts. This dilemma was addressed by Judge Wisdom in his dissenting opinion in the Fifth Circuit decision in *Weber v. Kaiser Aluminum & Chemical Corp.*, 563 F.2d 216, 230 (5th Cir. 1977), where he stated that:

> The employer and the union are made to walk a high tightrope without a net beneath them. On one side lies the possibility of liability to minorities in private actions, federal pattern and practice suits, and sanctions under Executive Order 11246. On the other side is the threat of private suits by white employees and, potentially, federal action. If the privately imposed remedy is either excessive or inadequate, the defendants are liable. Their good faith in attempting to comply with the law will not save them from liability, including liability for back pay (citation omitted).

Justice Blackmun, in his concurring opinion in *Weber, supra*, 443 U.S. at 210, in commenting on Judge Wisdom's "tightrope" argument, acknowledged the predicament which employers and unions face:

> If Title VII is read literally, on the one hand they face liability for past discrimination against blacks, and on the other they face liability to whites for any voluntary preferences adopted to mitigate the effects of prior discrimination against blacks.

See also Bratton v. City of Detroit, 704 F.2d 878, 884 n.18 (6th Cir.), *vacated and remanded*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984); *Setser v. Novack Inv. Co.*, 657 F.2d 962, 967-68 (8th Cir.), *cert. denied*, 454 U.S. 1064 (1981).

Thus, *Weber* has served as a way for employers to avoid "walk[ing] a high tightrope without a net beneath them." It has provided a flexible means not only for employers to limit their own liability, but also as a means of effectuating the purposes of Title VII and other federal and state nondiscrimination laws, orders and regulations by enabling them to increase the job opportunities available to minorities and women.

C. A Rule Limiting Relief In A Consent Decree In All Instances To Identifiable Victims Is Unworkable And Would Interfere With The Settlement Process.

Many employers, when negotiating consent decrees under Title VII, will attempt to identify those persons who may have been victims of discrimination and negotiate relief only for those persons. In many instances, however, it may be impracticable for a decree to include relief only for those persons identified as victims. For example, for various reasons, it may not always be possible to identify the particular persons who may have been harmed by allegedly unlawful practices.

In addition, plaintiffs may insist upon relief (usually in the form of goals and timetables) that may include persons who have not been identified as individual victims of discrimination. Although it may be preferable for decrees to attempt to focus on identified victims and provide relief only to victims, it simply may not be practicable or possible or even desirable in all cases to do so. In particular, in large class action cases, a series of mini-

trials to identify specific victims may take longer than a trial on the merits. Requiring such a procedure would greatly discourage voluntary settlements. Therefore, any rule that would limit parties to a consent decree in all instances only to providing relief to identified victims would unnecessarily interfere with the settlement process and would be contrary to the clearly expressed policy under Title VII favoring voluntary settlements.

D. A Rule Requiring Only Identified Victims In All Consent Decrees Would Interfere Unduly With Traditional Management Prerogatives With Which Congress Did Not Intend To Interfere.

Any blanket rule limiting relief in consent decrees only to identified victims also would undercut the clearly expressed intention of Congress in enacting Title VII that management prerogatives not be unnecessarily interfered with. This Court in *Weber*, 443 U.S. at 206, noted that:

> Title VII could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business. Those legislators demanded as a price for their support that "management prerogatives, and union freedoms . . . be left undisturbed to the greatest extent possible." (Citation omitted.)

In *Weber*, *id.* at 207, this Court further cautioned that Congress did not intend Title VII to "diminish traditional management prerogatives" or "to limit traditional business freedom." *Cf. California Brewers Association v. Bryant*, 444 U.S. 598, 608 (1980). In addition, in *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978), the Court cautioned that "[c]ourts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress, they should not attempt it." Any application of a strict identified victims standard for consent decrees would unduly interfere with the flexibility that *Weber* has provided and would be inconsistent with the important policies, as noted above, of preserving management prerogatives to the extent possible.

Finally, the lower court herein noted that "[t]o read *Stotts* as invalidating the present plan as impermissible under title VII is to conclude that *Stotts* sub silentio overruled *Weber*." 753 F.2d at 488 (Footnote omitted). It is important to keep in mind that *Stotts* was a statutory interpretation of what a *court* could *order* under Section 706(g). Thus, even if this Court were to hold that the consent decree in the instant case is limited by Section 706(g) to relief for identified victims, that holding would *not* apply to *voluntary, out-of-court agreements* that otherwise meet the standards of *Weber*. Thus, in the event this Court does hold the consent decree herein to be unlawful, it expressly should state that its decision has no effect on private voluntary out-of-court agreements that are consistent with *Weber*.

E. In The Event That This Court Determines That Relief In Consent Decrees Is Limited To Identified Victims, It Should Indicate Clearly That The Parties May Agree To Relief For Specific Individuals Without Admitting A Violation Of Title VII.

In the event that this Court holds that a consent decree under Title VII is limited to relief only for identified victims of discrimination, it also should clearly indicate that the parties are free to agree to relief for specific individuals without admitting a violation of Title VII. Any requirement that an employer must admit a violation of the law before relief for identified victims could be approved and ordered through a consent decree would undermine significantly the willingness of employers to explore negotiated settlements as a means of resolving Title VII allegations. *See* the dissent in *Stotts*, 104 S. Ct. at 2607. ("Any suggestion that a consent decree can provide relief only if a defendant concedes liability would drastically reduce, of course, the incentives for entering into consent decrees."). From the employer's

perspective, there would be a substantial risk that such an admission would be used by other employees or groups of employees in future lawsuits as evidence of the employer's unlawful discrimination.

The majority opinion in *Stotts*, as well as Justice O'Connor's concurring opinion, clearly indicated that no such admission of liability would be required in order to provide relief to specific individuals. *See Stotts*, 104 S.Ct. at 2588, 2593. Any rule that the parties cannot agree to putative victims and provide relief in a consent decree without admitting liability is not dictated by the majority opinion in *Stotts* and is flatly inconsistent with policies favoring the voluntary resolution of employment discrimination claims.

F. Any Decision Limiting Relief In Consent Decrees To Identified Victims Should Be Prospective Only And Should Not Subject Employers To Reverse Discrimination Liability For Actions That Predate Such A Decision.

The use of racial preferences in certain circumstances in the form of "quotas" or "goals and timetables," which may include persons other than the identifiable victims of discrimination, has been approved by nearly all courts that have addressed the issue. *See Stotts*, 104 S. Ct. at 2606 n.10. Employers justifiably and in good faith have relied upon the previous policy of the federal enforcement agencies and judicial decisions approving the use of racial preferences. *See, e.g., EEOC's Affirmative Action Guidelines*, 29 C.F.R. § 1608. Consistent with such precedent, many employers have entered into collective bargaining agreements, conciliation agreements, consent decrees or other settlement agreements which contain "quotas" or "goals and timetables" which may include persons other than the identifiable victims of discrimination. Many of those agreements would be jeopardized if this Court were to adopt a flat identified victims standard for relief that may be contained in consent decrees.

Employers thus would be subjected to an increased likelihood of "reverse discrimination" suits from persons who believe themselves to have been harmed by the operation of the agreements. Accordingly, if this Court does determine that relief under Title VII must be limited to identifiable victims, employer practices predating such a decision should be immune from reverse discrimination liability and, at most, any relief for reverse discrimination claimants should be prospective only. *See, e.g., Arizona Governing Committee v. Norris*, 463 U.S. 1073, 1091-95 (1983); *City of Los Angeles v. Manhart*, 435 U.S. 702, 720 and n.37, 722 (1978).

CONCLUSION

For the foregoing reasons, it is submitted that the Court should expressly hold that the identified victims limitations contained in Section 706(g) apply only in coercive actions and that voluntary agreements, even if incorporated in a consent decree, are governed by this Court's decision in *Weber*.

Respectfully submitted,

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January 24, 1986

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
JAN 24 1986
CLERK

No. 84-1999

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, C.L.C.,
Petitioner,

v.

CITY OF CLEVELAND, *et al.*,

and

VANGUARDS OF CLEVELAND,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND NATIONAL ASSOCIATION OF COUNTIES, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a local government that seeks to settle an employment discrimination action by voluntarily agreeing to promote some minority employees who have not specifically proved that they were the victims of discrimination, in circumstances in which such promotions would not violate the Fourteenth Amendment, Title VII of the Civil Rights Act of 1964, or any other law, is precluded from having its proposed agreement adopted by a federal district court as a consent decree.

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INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include municipal and county governments and their officials located throughout the United States, have a vital interest in legal issues that affect state and local governments. In this case, the City of Cleveland voluntarily entered into a consent decree to settle an employment discrimination suit brought against it under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and other statutory and constitutional provisions. The consent decree provides for the City to adopt a temporary, limited affirmative action plan that calls for race-conscious promotions in order to cure admitted past discrimination against black and Hispanic firefighters. The district court and the court of appeals—like every other court of appeals that has been confronted with a similar issue—upheld the consent decree. Petitioner, supported by the federal government, seeks to invalidate the decree.

In our view, the position of petitioner and the federal government, if it were to prevail, would constitute a major and unwarranted invasion of state and local autonomy in an extraordinarily sensitive area. Literally dozens of local governments, including virtually all of the nation's largest cities, and several states have successfully adjusted their employment practices in accordance with consent decrees and other court orders that require race-conscious affirmative action. Ironically, this situation is in large part the result of enforcement efforts that the federal government undertook for more than ten years, up until 1984.[1]

The effect of these affirmative action plans has not been to maintain rigid racial balances or to provide wind-

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[1] We are aware of at least 69 employment discrimination suits against state and local governments, either brought by or intervened in by the Department of Justice, that required affirmative action, in the form of specific minority hiring and promotion goals and timetables, as part of the relief awarded. (Materials supporting our factual assertions, including materials obtained from the Department of Justice under the Freedom of Information Act, have been lodged with the Clerk of the Court.)

fall benefits to minorities. Rather, they have provided a practical, workable way for state and local governments to eradicate the vestiges of prior discrimination while not "unnecessarily trammel[ling] the interests of the white employees" (*United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979)). Many of these plans have been in effect for a number of years and have worked well, enhancing the quality of state and local government and enabling those governments to put a divisive issue behind them and to return to the business of providing needed services to their residents.

Petitioner and the federal government seek to upset this practical and fair equilibrium. Indeed, following this Court's decision in *Firefighters Local Union No. 1784 v. Stotts*, 104 S.Ct. 2576 (1984), the Department of Justice sent letters to at least 56 state and local jurisdictions operating under court-approved affirmative action plans, announcing that the decrees were now unlawful and would have to be modified.[2] State and local governments have, almost unanimously, rejected these efforts of the federal government to engage in disruptive interference in their affairs, including, tellingly, even the minority of state and local jurisdictions whose affirmative action plans were imposed by contested court orders instead of consent decrees.

Lawsuits alleging racial discrimination present a unique potential for divisiveness. As we explain in greater detail below, when Congress enacted Title VII, it "excluded the[] issues" of "preferential treatment or quotas in employment" because it believed that "the problems raised by these controversial questions are more properly handled at a governmental level closer to the American people and by communities and individuals themselves." 110 Cong. Rec. 13493 (1964) (statement of Rep. MacGregor).[3]

[2] Copies of a number of these letters have been lodged with the Clerk.

[3] We also feel compelled to respond to the inappropriate suggestion made by both petitioner (Br. 32) and the federal government (Br. 24) that the governments of cities in which minorities are politically powerful will unfairly discriminate in favor of minorities. We would reject, and we presume that petitioner and the federal government would reject, any suggestion that officials of cities in which minority groups are not politically dominant routinely discriminate against minorities. We do not understand the basis on which petitioner and the federal government assume the converse.

Because petitioner and the federal government dishonor this congressional intention and seek to force literally dozens of communities and millions of citizens to reopen old wounds, *amici* submit this brief to assist the Court in its resolution of this case.[4]

STATEMENT

1. In 1980, respondent Vanguards of Cleveland, an association of black and Hispanic firefighters employed by the Cleveland Fire Department, brought suit in the United States District Court for the Northern District of Ohio against respondent City of Cleveland and various officials of the City. The Vanguards alleged, among other things, that the City's promotion practices had discriminated against black and Hispanic firefighters in violation of the Thirteenth and Fourteenth Amendments, Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and several other civil rights statutes. (J.A. 6-14).

While the City and the Vanguards were engaged in settlement negotiations, petitioner, the collective bargaining representative of the employees of the Fire Department, successfully moved to intervene in the litigation. Pet. App. A3. The Vanguards, the City, and petitioner then conducted extended tripartite negotiations under the supervision of the district court and a magistrate. All three parties agreed on a proposed consent decree that would settle the litigation, subject to the approval of petitioner's membership. *Id.* at A3-A4. When petitioner's membership disapproved the agreement, the Vanguards and the City resubmitted essentially the same proposed

[4] Pursuant to Rule 36 of the Rules of the Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

decree (City Br. in Opp. App. A3; see Pet. App. A31), and petitioner entered a formal objection (J.A. 96).

The proposed decree stated that "there has been a long history of discrimination against minority persons in the hiring practices and the promotion practices of the City of Cleveland Division of Fire" (Pet. App. A29) and that the objective of the decree was to "eliminate all vestiges of discrimination in the promotion practices" of the Fire Department (*id.* at A30). The decree required the City to use "only such promotion criteria as are non-discriminatory and demonstrably job related in compliance with Title VII" (*id.* at A33).

The consent decree also contained an affirmative action provision that was to terminate after four years (Pet. App. A34). This provision specified that the City was to compile a list of both minority and nonminority candidates who were eligible for promotion under an examination administered in 1981. The decree committed the City to making a number of promotions immediately: half of these promotions were to be awarded to eligible minority candidates, but only if a sufficient number of minority candidates had passed the examination (*ibid.*).[1]

The proposed decree further provided that the City was to conduct promotion examinations in 1984 and 1985 and was to make promotions from these examination lists in numbers it considered appropriate. In making these promotions, the City was to maintain goals of 10 to 25 percent minority representation in the job classifications to which promotions were made. The decree provided that if the number of minority candidates who passed the examination was insufficient to permit the City to maintain the goals, nonminority candidates were to be appointed. Pet. App. A34-A36.

2. After inviting petitioner to submit evidence and considering its objections, the district court adopted the proposed consent decree (Pet. App. A7). The court

[1] If there was an insufficient number of minority candidates in any one year, nonminority candidates would be appointed and the shortfall in minority appointments would be made up the following year, if possible (Pet. App. A34).

found, on the basis of "[t]he documents, statistics, and testimony presented at . . . hearings" it had held during the negotiations, that there was "a historical pattern of racial discrimination in promotions in the City of Cleveland Fire Department" (City Br. in Opp. App. A3-A4). The court noted the limited duration of the consent decree and ruled that it constituted "a fair, reasonable, and adequate resolution of the claims raised in this action" (*id.* at A5). The court reasoned as follows (*ibid.*):

> [T]he use of a quota system for the relatively short period of four years is not unreasonable in light of the demonstrated history of racial discrimination in promotions in the City of Cleveland Fire Department. It is neither unreasonable nor unfair to require nonminority firefighters who, although they committed no wrong, benefited from the effects of the discrimination to bear some of the burden of the remedy.

3. Petitioner appealed, and the court of appeals affirmed. The court of appeals considered three issues: whether the district court had abused its discretion in concluding that the consent decree was fair and reasonable (Pet. App. A2, A9); whether the affirmative action promotions that the City agreed to make would violate the Equal Protection Clause of the Fourteenth Amendment (*see id.* at A9 n.1); and whether those promotions would violate Title VII (*see id.* at A9-A20). The court reasoned that an affirmative action plan that satisfied the standards specified in *United Steelworkers v. Weber*, 443 U.S. 193, 208-09 (1979)—a case in which this Court rejected a Title VII challenge to an employer's voluntary affirmative action plan—would also comply with the Equal Protection Clause and could reasonably be adopted as a consent decree (*see* Pet. App. A9-A12).

The court held that the consent decree satisfied this standard because it was, among other things, "reasonably related to the objective of remedying prior discrimination" and "fair and reasonable to non-minorities who may be affected by it" (Pet. App. A9). The court first noted that petitioner "does not contest the district court's

finding of racial discrimination and thus does not deny the existence of a substantial state interest in some remedial action" (*id.* at A10). The court further noted that the consent decree established only "relatively modest goals" (*ibid.*); that it did "not require the hiring of unqualified minority firefighters or the discharge of any non-minority firefighters" (*id.* at A11); that it did "not create an absolute bar to the advancement of non-minority employees" (*ibid.*); and that the decree "will remain in effect for only four years, which indicates that the plan 'is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance'" (*ibid.*, quoting *Weber*, 443 U.S. at 208).

The court of appeals specifically rejected petitioner's contention that the district court was barred from adopting the consent decree because the court could not have ordered the relief contained in the decree over the City's objection after a contested trial on the merits. The court reasoned as follows (Pet. App. A20 n.10):

> To be sure, a consent decree is a judicial "order" and may not be inconsistent with the underlying statute. It is one thing, however, to say that decrees must be consistent with the underlying statute and quite another to say that they must mimic court-ordered remedies in every particular. If the decree had contained a remedy which violated non-minorities' rights under title VII, it plainly would have been inconsistent with the statute. Since this plan is within the limits set in *Weber* (and those set . . . [by] the fourteenth amendment . . .), however, it does no violence to non-minorities' legal rights.[*]

SUMMARY OF ARGUMENT

Although petitioner asserts that the implementation of the consent decree would unlawfully discriminate against its members on the basis of race, petitioner does not invoke either Section 703 of Title VII or the Equal Protection Clause—the principal prohibitions against discrimination by public employers. The court of appeals held that the consent decree did not violate either Section 703 or the Fourteenth Amendment, and petitioner does not challenge those rulings. Nor has petitioner asserted that the consent decree is inconsistent with any collective bargaining agreement between it and the City. Instead, petitioner contends that the consent decree is invalid because it did not consent to the decree and because the decree is inconsistent with Section 706(g), the provision of Title VII that defines a court's remedial authority.

A. Petitioner's contention that the decree is invalid because it did not consent is obviously incorrect. Petitioner's refusal to consent means that it is not bound by the decree; the decree imposes no legal obligations on petitioner, and petitioner was free to raise any legal challenge to the consent decree that it wished to raise, and to insist upon a full hearing on the merits of that challenge.

But no one asserts that the decree imposes any legal duties or obligations on petitioner; it imposes obligations only on the parties to the decree, the City and the Vanguards. And no one has sought to foreclose petitioner from raising any legal challenge to the decree, or any claim that the decree violates its legal rights; before this Court, petitioner is challenging the decree as a violation of Section 706(g), and petitioner is entitled to have that challenge resolved on the merits. In order to have the decree set aside, however, petitioner must show that it violates petitioner's legal rights or is unlawful in some other way. Petitioner cannot obtain the invalidation of an otherwise lawful decree to which the City and the Vanguards have consented merely by withholding its consent.

B. Petitioner contends that the decree violates Section 706(g) because it provides relief to minority employees who have not proved that they were victims of discrimination. This contention is incorrect for a number of reasons.

[*] Judge Kennedy dissented (Pet. App. A26-A28). She relied almost entirely on this Court's decision in *Firefighters Local Union No. 1784 v. Stotts*, 104 S.Ct. 2576 (1984), although she acknowledged that the Court in *Stotts* "was not directly faced with the question" that she believed this case to present (Pet. App. A24).

First, petitioner does not dispute that the City and the Vanguards could lawfully adopt precisely the same affirmative action plan that is at issue here and implement it without judicial involvement. Nor can petitioner explain how the fact that the affirmative action plan happens to be embodied in a consent decree adversely affects its interests. Consequently, petitioner's claim is wholly artificial: petitioner asserts that a fortuity that does not affect its interests—the fact that the parties have chosen to embody their agreement in a consent decree—provides it with a basis to challenge an affirmative action plan that it would otherwise concede to be lawful.

Moreover, petitioner's contention is inconsistent with the language of Section 706(g) itself. That language is plainly intended to protect an employer from being "require[d]" to hire or promote someone to whom it has "refused" employment for a legitimate, nondiscriminatory reason. The plain language of Section 706(g) does not apply to a situation like this, in which the employer wishes to promote the minority employees.

Petitioner's contention also cannot be squared with this Court's decisions or with the legislative history of Title VII. The legislative history shows that Congress sought to enable state and local governments to increase minority representation in their workforces, so as to improve their relations with minority citizens and to enhance their understanding of the problems of minorities. The legislative history emphatically demonstrates that Congress did not share petitioner's narrow view that the only purpose of Title VII is to afford a remedy to individuals who have been shown to be victims of discrimination.

In addition, petitioner's interpretation of Title VII would not further any principled policy objective: even if petitioner prevails, any employer who wishes to engage in affirmative action will still be able to do so, to the same degree, as long as it does not embody its plan in a consent decree. The only effect of petitioner's approach would be to reduce the "amount" of affirmative action on a random and irrational basis while jeopardizing the important interest in promoting the settlement of Title VII

litigation, because frequently parties may be able to settle an employment discrimination action only if they can embody an affirmative action plan in a consent decree.

Finally, even if Section 706(g) does impose some requirement that a consent decree be "victim-specific," that requirement is met here, for two reasons. First, it is wholly impractical to expect a consent decree settling broad-based claims to provide for individualized determinations of whether particular persons are victims of discrimination. Such a consent decree will almost always have to use a general criterion that cannot perfectly identify the actual victims. When that criterion satisfies the standards of the Fourteenth Amendment and Section 703, is upheld by the trial court as reasonable, and is accepted by the fiduciary representatives of the victim class, no further assurances of "victim-specificity" should be required.

Second, the decree in this case requires the City to promote minority firefighters only to the level that the City would have been expected to reach if it had never discriminated. Since nonminority firefighters have the same number of positions open to them that they would have had in the absence of discrimination, they are not prejudiced by the consent decree. They have no legitimate interest in insisting that the identity of the minority firefighters be the same as it would have been if the City had not discriminated.

ARGUMENT

THE DISTRICT COURT WAS NOT PRECLUDED FROM ADOPTING A CONSENT DECREE PROVIDING FOR LAWFUL AFFIRMATIVE ACTION PROMOTION PRACTICES TO WHICH THE CITY VOLUNTARILY AGREED.

Two great charters of racial nondiscrimination apply to public employers: the Equal Protection Clause of the Fourteenth Amendment, which provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws"; and Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C.

2000e-2(a), which broadly prohibits all employers from discriminating on the basis of race. If the consent decree adopted in this case violated the rights of petitioner's members under either the Fourteenth Amendment or Section 703, those employees would be entitled to relief.

The court of appeals held, however, that the consent decree does not violate the Fourteenth Amendment (see Pet. App. A9-A12 & n.1), and petitioner has not challenged that aspect of the court of appeals' decision.[1] Petitioner appears never even to have alleged that the consent decree violates Section 703. See J.A. 15-22, 27-28, 96-98. In any event, the court of appeals ruled that the consent decree at issue in this case satisfies the standards, specified in *Weber*, that Title VII imposes on voluntary affirmative action by an employer, and petitioner has not challenged that aspect of the decision below.[2]

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[1] Petitioner's brief on the merits contains a few unsupported suggestions that the consent decree violates the Equal Protection Clause (see, e.g., Pet. Br. 21, 31), but petitioner does not make any substantial argument to this effect. More important, the questions presented by the petition cannot fairly be read to comprise a challenge to the court of appeals' ruling on the Equal Protection Clause issue. See S.Ct. R. 21.1(a). Petitioner's modification of those questions in its brief on the merits further reveals that petitioner never contended that the affirmative action plan embodied in the consent decree would have violated either the Fourteenth Amendment or Section 703(a) if it had been adopted by the City without judicial involvement. See Pet. Br. i.

We further note that the federal government makes no effort to argue that the consent decree violates the Equal Protection Clause; that petitioner's briefs below make no substantial argument that the consent decree violates the Equal Protection Clause; and that an aspect of the question of the extent to which the Fourteenth Amendment limits a public employer's power voluntarily to adopt affirmative action employment practices is before the Court in *Wygant v. Jackson Bd. of Ed.*, cert. granted, No. 84-1340.

[2] See note 7, *supra*. Neither the petition nor petitioner's brief on the merits, nor petitioner's briefs in the court of appeals, contain any substantive discussion of Section 703(a) or *Weber*. Indeed, because petitioner does not ask this Court to reconsider *Weber*, the question whether the affirmative action plan would violate Section 703(a) if adopted by the City without judicial

Similarly, if petitioner had shown that the consent decree required the City to violate the terms of an enforceable collective bargaining agreement between petitioner and the City, petitioner might well be entitled to some form of relief. See *W.R. Grace & Co. v. Local 759, International Union of Rubber Workers*, 461 U.S. 757 (1983). But petitioner has not established that the consent decree violates the terms of any collective bargaining agreement. Indeed, although the district court invited petitioner to introduce evidence supporting its formal objection to the decree (see J.A. 86-87), petitioner never introduced a collective bargaining agreement, and it appears that no agreement is part of the record of this case. No claim that a collective bargaining agreement was violated was raised before, or considered by, the courts below, and no such claim was raised in the petition.[3]

Thus, petitioner has failed to invoke the Equal Protection Clause, Section 703 of Title VII, or a collective bargaining agreement—the most obvious and important sources of protection for nonminority employees who seek to challenge an employer's decision to grant certain benefits to minority employees. Instead, petitioner contends that the consent decree is invalid for two other reasons: because it was entered without *petitioner's* consent, and because it is barred by Section 706(g) of Title VII, 42 U.S.C. 2000e-5(g). We submit that neither of these contentions has merit.

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involvement requires no more than the application of settled principles to the facts of this particular case. It therefore presents no issue worthy of the Court's review.

We note that, in any event, the affirmative action plan at issue in this case closely resembles the plan upheld by this Court in *Weber*. See 443 U.S. at 197-98.

[3] The federal government makes an overtly extra-record reference to a collective bargaining agreement, and its description of the agreement's contents is substantiated only by a citation to unsupported statements in the dissenting opinion (U.S. Br. 1-2). The federal government's assertion that "[i]t seems fair to assume" that the district court "improper[ly]" refused to allow petitioner to make a claim under a collective bargaining agreement not only is unsubstantiated but is contradicted by the record.

A. Petitioner's Refusal to Consent Did Not Bar the District Court From Adopting the Decree.

Petitioner and, to an even greater extent, the federal government, contend that the consent decree is invalid because only the City and the Vanguards, and not petitioner, consented to it. In our view, this contention rests on an obvious misconception and can be easily dismissed.

Petitioner's failure to consent to the decree is immaterial because the courts below did not hold—and no party contends—that the decree is legally binding on petitioner. The decree imposes no legal duties or obligations on petitioner. Petitioner—unlike respondents—cannot be held in contempt on the basis of a failure to comply with its terms. It is true that the decree can be expected to have an effect on petitioner; but consent decrees routinely affect non-parties. A consent decree settling a major antitrust suit, for example, may affect firms and consumers throughout the economy, often in very dramatic ways. But it obviously does not follow that each of the affected persons may obtain the invalidation of the decree merely by withholding consent.

The entry of the decree also left undisturbed petitioner's legal right to challenge the decree on any ground. Petitioner could have challenged the decree as a violation of federal law; as a breach of a collective bargaining agreement if an enforceable agreement exists; or on any other basis. It had a right to a full hearing on any such challenge. No court or party has sought to deprive petitioner of that right. And if any such challenge were to succeed—if, for example, petitioner were to succeed before this Court on its claim that the consent decree violates Section 706(g), or if it were to have shown that the consent decree required the City to violate an enforceable collective bargaining agreement—petitioner would be entitled to the appropriate relief, which might include the invalidation of the consent decree. Cf. *W.R. Grace & Co.*, 461 U.S. at 769 & n.13. But in order to obtain invalidation of the decree, petitioner must make and sustain such a legal challenge.

Petitioner cannot obtain the invalidation of the decree merely by objecting to it; all its objection does is leave petitioner free to challenge the decree on some independent legal ground.[10]

The federal government marshals impressive support for the indisputable proposition that "a party cannot be bound to a 'consent' decree unless that party in fact consents" (U.S. Br. 26). But that principle is simply irrelevant here, because no one has suggested that petitioner is "bound." All of petitioner's legal rights—its legal right to act as it pleases, and its right to challenge as unlawful any conduct by the City or any other party—remained intact, unaffected by the entry of the consent decree.[11] Petitioner's refusal to consent to the decree is therefore irrelevant.

B. Section 706(g) Does Not Invalidate the Consent Decree.

Petitioner asserts that Section 706(g) precludes the consent decree at issue in this case because it forbids a court from entering an order in a Title VII case granting relief to any individual who has not proved that the employer specifically discriminated against him. At the outset, it is important to distinguish between court orders entered with the employer's consent and orders entered over the employer's objection. Many of the arguments advanced in support of petitioner's contention attempt to show that Sec-

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[10] The question remains whether a challenge to a consent decree must be raised by intervening in the proceeding that culminated in the decree—in which event certain claims might be barred at this point by petitioner's failure to raise them—or can be raised in a separate action. See, *e.g.*, *Sheppard v. City of Jackson*, 687 F.2d 66 (5th Cir. 1982), cert. denied, 464 U.S. 900 (1983). But this question is not now before the Court.

[11] We note that the Fifth Circuit decisions cited by the federal government (U.S. Br. 27 n.24) merely hold that a consent judgment to which the union has not consented cannot foreclose it from asserting its rights under a collective bargaining agreement—including, in principle, the right to have the consent decree invalidated and the collective bargaining agreement specifically performed. In this case, no one asserts that any of petitioner's rights have been foreclosed by the entry of the consent decree.

or Section 703, and from the fact that Section 706(g) applies only to "court orders."

If the City and the Vanguards had taken this course—if they had embodied their mutually acceptable affirmative action plan in a judicially *enforceable* contract instead of a consent decree[13]—petitioner's interests, whatever they are, would have been adversely affected to precisely the same extent that they are affected by the consent decree actually entered in this case. Yet while petitioner would necessarily have to acknowledge the lawfulness of an affirmative action plan adopted without judicial involvement, petitioner vigorously asserts that the consent decree is illegal. Congress could not have intended to preclude the consent decree as a violation of petitioner's rights while permitting an agreement that is functionally indistinguishable from petitioner's point of view. *See Ashley v. City of Jackson*, cert. denied, 464 U.S. 900, 902 (1983) (Rehnquist, J., dissenting): "[A] consent decree . . . is little more than a contract between the parties, formalized by the signature of a judge."

To put the point another way, petitioner's objection is to the fact that the agreement between the City and the Vanguards provides for race-conscious relief. That objection is of course to be taken seriously. But it is to be evaluated according to the standards established by the prohibitions that make it unlawful for a public employer to engage in racial discrimination—Section 703 and the Fourteenth Amendment. Instead of invoking those standards, petitioner seizes upon the fact that the agreement is embodied in a consent decree—a fact that has essentially no impact on petitioner's interests—and claims that, because of that fact, it is entitled to greater protection than Section 703 and the Fourteenth Amendment afford. It

[13] Voluntary and otherwise lawful affirmative action plans can, of course, be enforced in court like other contracts, in appropriate circumstances. Section 706(g), the only provision on which petitioner relies, applies only to remedial orders in Title VII cases; it indisputably does not apply to a suit to enforce a voluntary agreement. *See Weber*, 443 U.S. at 207 n.7. Neither petitioner nor the federal government suggests otherwise.

tion 706(g) prohibits a court from ordering an employer to engage in certain race-conscious employment practices *over the employer's objection*. *See, e.g.*, Pet. Br. 14-15, 21-31; U.S. Br. 6-18. But the question whether Section 706(g) contains such a prohibition is not at issue in this case, because the City consented to entry of the decree.[12]

We will assume *arguendo* that the City could not have been ordered to implement the promotion practices at issue here against its will, even if it had been found guilty of discrimination. But for numerous reasons, petitioner and the federal government are wrong when they assert that a *consent decree* mandating those practices is unlawful.

1. *There is no practical reason to treat a consent decree differently from voluntary affirmative action taken without judicial involvement.*

The most salient feature of petitioner's position is its formalistic and contrived character. Petitioner's claim hinges entirely on the fact that the City and the Vanguards, after agreeing on a remedial affirmative action plan, chose to ask the district court to embody that plan in a consent decree. If the plan were not embodied in a consent decree, the legal objection that petitioner has raised to the plan would have no application whatever. But the fact that the plan is embodied in a consent decree makes no practical difference to petitioner, and it makes no sense to permit petitioner to obtain the invalidation of the plan solely because of that fortuity.

If the City and the Vanguards had agreed on precisely the same affirmative action plan that is at issue in this case and had begun implementing it without seeking a consent decree, petitioner would have to concede that their actions were lawful. Such a concession—which the federal government appears to make explicitly (U.S. Br. 30)—follows directly from petitioner's failure to challenge the decree under either the Fourteenth Amendment

[12] This question appears to be before the Court in *Local 93, Sheet Metal Workers v. EEOC*, cert. granted, No. 84-1656.

makes no sense to confer greater rights on petitioner by virtue of a circumstance that has no practical effect on it.

2. *The plain language of Section 706(g) refutes petitioner's interpretation.*

In defense of their anomalous position, petitioner and the federal government rely primarily on the plain language of the last sentence of Section 706(g). That sentence provides:

> No order of the court shall require . . . the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section [703(a)].

Petitioner asserts that the consent decree at issue in this case is an "order of the court" that "require[s]" relief of the kind precluded by this sentence. Even if the phrase emphasized by petitioner is taken in isolation, it is entirely clear that petitioner's interpretation is incorrect. The City voluntarily agreed to the promotion practices that petitioner attacks. The City was not "require[d]" by an "order of the court" to promote anyone; the source of any "requirement" to which the City is subject is the City's own volition, not a court order.

Moreover, it is axiomatic that any particular phrase in a statute must be considered in the context of the entire provision. See, *e.g.*, *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974). Petitioner simply glosses over the remainder of the language of Section 706(g); when the last sentence of Section 706(g) is read as a whole, it clearly refutes petitioner's contention that an employer may not consent to a decree that grants relief to persons who have not established that they are victims of unlawful discrimination. To begin with, the sentence does not use the term "actual victim" or "victim-specific"; instead, it provides that a court may not require the "promotion of an individual . . . [who] was refused . . . advancement

. . . for any reason other than discrimination . . . ." This language clearly contemplates a situation in which an employer is being forced to promote an employee against its will—an employee to whom it has chosen to deny a promotion for a legitimate, nondiscriminatory reason. This language has no application to a situation in which an employer is *willing* to promote the employees to whom the court order applies.

The incompatibility between petitioner's contention and the plain language of Section 706(g) becomes even clearer if one attempts to apply petitioner's reasoning to a consent decree that provides that an employer is to engage in race-conscious *hiring*. A decree might well require an employer to hire a certain percentage of minorities but leave the employer free to reject any particular individual to whom it wished to "refuse[] employment" for a legitimate reason. Thus the last sentence of Section 706(g) cannot be read to preclude consent decrees mandating affirmative action in hiring. Because there is no reason to believe that Congress intended to distinguish between hiring and promotions, petitioner's contention that the last sentence of Section 706(g) prohibits affirmative action in promotions cannot be squared with the very statutory language on which petitioner relies.

3. *The legislative history of Title VII demonstrates that state and local governments may attempt to increase minority representation among their employees and are not limited to providing relief to specific victims of discrimination.*

Petitioner's contention necessarily rests on the assumption that the *sole purpose* of Title VII is to protect the right of individual employees to be free from discrimination. Only if Title VII has no other purpose can petitioner possibly support its claim that the City in this case is rigidly precluded from providing any benefit to any person who has not proved himself to be a victim of discrimination.

Congress did not share this conception of the purpose of Title VII. The legislative history of the 1972 Amend-

ments to Title VII—the amendments that extended its coverage to state and local governments—demonstrates that Congress believed that it was important for state and local governments, which must deal regularly with minority citizens, to expand the representation of minorities in their workforces. The legislative history therefore establishes that the City in this case is free to agree to reasonable affirmative action measures that remove severe racial imbalances caused by past discrimination in the Fire Department, even though those measures are not narrowly tied to providing make-whole relief to individually identified victims of discrimination.

For example, the House Report accompanying the provisions that extended Title VII to state and local governments explained that "employment discrimination . . . has the most deleterious effect in the[] governmental activities which are most visible to the minority communities (notably education, law enforcement, and the administration of justice) with the result that the credibility of the government's claim to represent all the people equally is negated." H.R. Rep. No. 238, 92d Cong., 1st Sess. 17 (1971); *see also id.* at 19. The Senate Report expressed the same view even more strongly (S. Rep. No. 415, 92d Cong., 1st Sess. 10 (1971)):

> This 'failure of State and local governmental agencies to accord equal employment opportunities is particularly distressing in light of the importance that these agencies play in the daily lives of the average citizen. From local law enforcement to social services, each citizen in a community is in constant contact with many local agencies. The importance of equal opportunity in these agencies, is, therefore, self-evident. In our democratic society, participatory government is a cornerstone of good government. Discrimination by government therefore serves a doubly destructive purpose. The exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in that particular community, but also creates mistrust, alienation, and all too often hostility toward the entire process of government.

Senator Williams, the sponsor of the 1972 Amendments, echoed these views. 118 Cong. Rec. 1816 (1972). Senator Williams also referred to the importance of ensuring "adequate minority representation" in state and local governments (*ibid.*), and he emphasized that "[i]f the[] decisions [of state and local governments] are to be responsive to the needs and desires of the people, it is essential that those making the decisions be truly representative of all segments of the population" (*ibid.*).

It is therefore evident that, when a local government provides employment opportunities to minorities for the purpose of increasing minority "representation," enhancing minority "participation in the bureaucracy," and combatting "ignorance of minority problems," it is carrying out Congress's purposes. It need not also show that it is providing make-whole relief to specific victims of discrimination.

4. *Petitioner's contentions are inconsistent with this Court's decisions.*

The leading case concerning a federal court's authority to enter a consent decree is *Swift & Co. v. United States*, 276 U.S. 311 (1928). The Court in *Swift* specifically rejected a claim that a provision of a consent decree entered under the Sherman Antitrust Act was void because it was "not merely unauthorized by, but . . . contrary to, . . . the Anti-Trust Act" (276 U.S. at 329). Petitioner's claim in this case is parallel to that rejected in *Swift*: petitioner asserts that the consent decree in this case should be set aside because it is contrary to Title VII. Yet petitioner makes no effort to distinguish *Swift*.[11]

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[11] Indeed, in its brief at the petition stage, the federal government asserted, without mentioning *Swift*, that there is an "important principle that a consent decree may not award relief that exceeds statutory limitations" (at 11); and in its brief on the merits, the federal government asserts, without citation of authority and again with no reference to *Swift*, that "a consent decree . . . certainly cannot grant relief that a statute expressly forbids" (at 21; emphasis omitted).

The Court in *Swift* further stated that a consent decree is void only if there is a "lack of actual consent to the decree as entered[,] . . . or . . . fraud in its procurement[,] . . . or . . . lack of federal jurisdiction" (276 U.S. at 324; citations omitted). See also *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981). Petitioner does not allege that the consent decree at issue in this case suffers from any of these defects, and no such allegation would be plausible. We know of nothing in either the legislative history of Title VII or the language of Section 706(g)—where, as a structural matter, the last sentence appears to occupy a position no different from that of several other technical limitations on the court's remedial power—that remotely suggests that that sentence imposes a "jurisdictional" limitation. See also *Aero Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 561 (1968) (citation omitted) ("Any error in granting or designing relief 'does not go to the jurisdiction of the court.'").

In addition, petitioner's position cannot be reconciled with the logic of this Court's decision in *Weber*—a decision that petitioner and the federal government essentially ignore. Although *Weber* upheld an affirmative action plan adopted by private parties without judicial involvement, the Court's opinion in *Weber* leaves no doubt that the decisive aspect of the plan was its voluntary character. See, e.g., 443 U.S. at 198, 200, 201, 203, 207. A consent decree is not in any way less voluntary than the plan upheld in *Weber*. And, in language that foreshadows this case, the Court in *Weber* quoted legislative history demonstrating that "the problems raised by the[] controversial issues" of "preferential treatment or quotas in employment" were "excluded" in the drafting of Title VII because they "*are more properly handled at a governmental level closer to the American people and by communities and individuals themselves.*" 443 U.S. at 208, n.7, quoting 110 Cong. Rec. 15893 (1964) (statement of Rep. MacGregor) (emphasis added).[21]

[21] *See also Regents of the University of California v. Bakke*, 438 U.S. 265, 353 n.29 (1978) (opinion of Brennan, White, Marshall,

While it must be quite common for consent decrees to affect adversely the interests of third parties (see, e.g., *United States v. California Cooperative Canneries*, 279 U.S. 553 (1929)), petitioner does not cite a single decision of this Court in which an intervenor has successfully challenged a consent decree on the ground that it exceeded statutory limits on a court's remedial power. Instead, petitioner and the federal government rely heavily on *Firefighters Local Union No. 1784 v. Stotts*, 104 S.Ct. 2576 (1984), and engage in an elaborate and Procrustean effort to convert *Sputnik Federation No. 91 v. Wright*, 364 U.S. 642 (1961), into support for their position. But *Stotts* manifestly did not settle the question presented in this case; in fact, it intimated that a consent decree like that at issue here would be lawful.[22] And *Sputnik Federa-*

and Blackmun, JJ.) ("Executive, judicial, and congressional action subsequent to the passage of Title VII conclusively established that the Title did not bar the remedial use of race.").

[22] In *Stotts*, an employer had entered into a consent decree providing for affirmative action in hiring. The express terms of the consent decree were not challenged; for that reason alone, *Stotts* does not control this case.

What was challenged in *Stotts* was an injunction issued over the employer's objection that prohibited the application of a bona fide seniority system to decisions concerning the laying off of minority employees. The Court viewed this injunction as providing relief, in the form of protection from layoffs, to individuals who were not the specific victims of discrimination. See 104 S.Ct. at 2586, 2588. In deciding whether the injunction was valid, the Court first considered whether the injunction could be upheld on the ground that it "did no more than enforce the terms of the agreed-upon consent decree" (*id.* at 2585). If, as petitioner urges, a consent decree cannot provide relief that is not victim-specific, the Court could have disposed of this issue easily: the injunction could not possibly have been justified on this ground, because a consent decree that provided for relief that was not victim-specific would have been unlawful.

But the Court's analysis in *Stotts* never supported this view. Instead, the Court considered whether a reasonable interpretation of the consent decree would support the injunction. See id.

tion, like the portions of *Stotts* on which petitioner principally relies, simply did not concern the question presented in this case—the *scope* of a court's authority to adopt a consent decree agreed to by the parties. Instead, it concerned the quite different question of a court's power to *modify* a consent decree over the objection of a party bound by the decree because a change in circumstances rendered the initial decree inequitable.

Indeed, *System Federation*—which involved a consent decree entered in an action to enforce the Railway Labor Act—implicitly rejected petitioner's position. The premise of the Court's decision in *System Federation* was that "[t]he record leaves no room for doubt that the parties in fact attempted to conform the consent decree to the dictates of the Railway Labor Act as it then read." 364 U.S. at 652. This premise would have been entirely unnecessary if, as petitioner urges, parties to a consent decree can never do otherwise.

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at 2566. The Court never suggested that no consent decree could ever lawfully support an injunction that was not victim-specific.

In fact, the Court twice suggested that the position taken by petitioner in this case is incorrect. The Court began its discussion by indicating that a consent decree might provide relief that a court could not order at the conclusion of a contested proceeding (*id.* at 2566, quoting *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971)):

> It is to be recalled that the "scope of a consent decree must be discerned within its four corners, and not by reference to . . ." . . . what "might have been written had the plaintiff established his factual claims and legal theories in litigation."

And the Court clearly intimated, in direct contradiction to petitioner's contention, that a consent decree may provide for relief that a court could not order over the employer's objection after a contested trial (106 S.Ct. at 2566; emphasis added):

> [I]t is unthinkable to believe that the "remedy", which it was the purpose of the decree to provide, would not exceed the bounds of remedies that are appropriate under Title VII, at least absent some express provision to that effect.

3. *Petitioner's construction of Title VII would promote no policy objectives while seriously jeopardizing the important interest in facilitating the settlement of Title VII litigation.*

a. Petitioner and the *amici* supporting its position fail to identify a single policy objective that would be promoted in a principled fashion by the position that petitioner advances. The policy that petitioner and its *amici* incessantly invoke—the interests of nonminority employees in being free from the effects of race-conscious actions that benefit minorities—does not provide principled support for petitioner's position: even if petitioner prevails, employers will be free, under *Weber*, to make race-conscious employment decisions in order to remedy prior discrimination against minorities. It may well be true that if petitioner's position were to prevail, there would be "less" affirmative action in society as a whole. But there would similarly be "less" affirmative action if voluntary affirmative action plans were invalidated on a completely random basis, say, one out of every three, regardless of the merits of a particular case. There is no reason to believe that Congress intended to "reduce" the "amount" of affirmative action in such a fashion.[17]

Petitioner also suggests that its contention is supported by the undeniably important policy of ensuring that public employees remain competent and professional. But the protection of that interest is, of course, entrusted to the

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[17] Petitioner and the federal government also appear to suggest that, even though their contention cannot reach voluntary affirmative action plans adopted without the assistance of a court, it will at least keep the court's hands "clean" of affirmative action. This suggestion appears to assume that Congress shared the generalized antipathy to affirmative action that pervades the arguments of petitioner and several of its supporting *amici*—an assumption that is inconsistent both with *Weber* and with the legislative history. In any event, as we have noted, an employer may place an affirmative action plan beyond the reach of Section 706(g) by embodying it in a judicially enforceable contract or collective bargaining agreement. Courts would, therefore, become involved in the enforcement of affirmative action agreements even if petitioner were to prevail.

state and local governments. See, e.g., Connick v. Myers, 461 U.S. 138, 151 (1983); *Bishop v. Wood*, 426 U.S. 341, 349 (1976). Those governments will invariably insist—as the City insisted here—that no affirmative action plan require the hiring or promotion of an unqualified candidate. When an employer adopts or agrees, for its own reasons, to an affirmative action plan that will benefit qualified minority employees and that will not violate Section 703 or the Fourteenth Amendment, the plan—like any other lawful personnel decision made by an employer—should not be invalidated simply because some nonminority employees disagree with it.

b. As we have explained, the fact that an affirmative action plan is embodied in a consent decree will be a matter of indifference to nonminority employees. But it will not be a matter of indifference to litigants, who will frequently find it easier to settle a case if they have the option of embodying the settlement agreement in a judicial decree. That is why consent decrees are widely used as devices to facilitate settlement. By precluding the option of an affirmative action consent decree, petitioner's position would make it substantially more difficult to settle Title VII litigation."

For example, a court that enters a consent decree retains jurisdiction to modify it. See, *e.g., United States v. Swift & Co.*, 286 U.S. 106, 114 (1932). This feature of a consent decree provides important flexibility for parties who are concerned that conditions may change in a way that will render the enforcement of the initial agreement unjust. *See System Federation*, 364 U.S. at 647-48. Such parties will often be unable to reach any agreement in settlement of the case unless they can vest in the district

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" Indeed, it was a premise of this Court's decision in *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981), which held that a district court's refusal to enter a consent decree is appealable under 28 U.S.C. 1292(a)(1), that parties who are denied the opportunity to enter into a consent decree may be unable to settle the litigation and will be "effectively [forced] . . . to proceed to trial" (450 U.S. at 87).

court the authority to modify the decree—that is, unless the option of a consent decree is available.

A consent decree has several other advantages as a means of settling litigation. It is easier to obtain enforcement of a consent decree because it will be unnecessary to prove many facts that would otherwise have to be shown in order to establish the validity of an ordinary contract. A court that maintains continuing jurisdiction over a consent decree will have a more flexible repertoire of enforcement measures. And it is likely to be easier to channel litigation concerning the validity and implications of a consent decree into a single forum—the court that entered the decree—thus avoiding the waste of resources and the risk of inconsistent or conflicting obligations.

For all of these reasons, parties who agree in some measure on the substantive terms of a potential settlement agreement are more likely to settle when a consent decree is an option. If petitioner's position were to prevail, parties seeking to settle Title VII litigation on terms that include a lawful affirmative action plan would not have the option of entering a consent decree. Thus the *only effect* of petitioner's position—at least, the only effect that would not be achieved equally well by the random invalidation of otherwise lawful affirmative action plans—will be to discourage settlements.

6. Even if Section 706(g) requires "victim-specific" relief, the consent decree at issue in this case satisfies that requirement because it complies with Section 703 and the Fourteenth Amendment and was upheld as reasonable by the courts below.

a. While petitioner and the federal government extol the abstract virtues of "victim-specificity," state and local governments are faced with the intensely practical problem of settling employment discrimination actions, and it is far from clear how any requirement of "victim-specificity" would apply to a consent decree. The federal government asserts (U.S. Br. 28-29) that the City should have entered into a consent decree that provided only the general terms of the settlement and that required em-

ployees to establish their entitlement to relief on an individual basis, apparently in proceedings before a "magistrate" or an "arbitrator" (*id.* at 28 & n.25).[26] But it is immediately apparent that such an approach not only would be little better than no settlement at all, but would be wholly impractical to administer.

A principal reason that parties settle employment discrimination actions is precisely to avoid employee-by-employee litigation over which individuals were victims of discrimination. Such litigation is protracted and burdensome; it requires an investment of resources that is greatly disproportionate to the objective; and it pits employees against each other in a way that risks serious disruption of a state or local government's work.[27]

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[26] The federal government confidently asserts that "a judicial or quasi-judicial determination of whether and to what extent each class member is an actual victim of discrimination" will not be "necessary" (U.S. Br. 29) because "the parties" might "accept[] the facts of individual cases" or "the parties" may "be able to settle the case without outside assistance if their counsel are able to develop a cooperative relationship" (*id.* at 28 n.25). But in this case, the parties—the alleged victims of discrimination and the allegedly discriminating employer—*did* agree on which employees were to be afforded relief, and the federal government obviously does not consider that sufficient.

[27] Moreover, if an employer wishes to consent to the awarding of employment opportunities to a class of individuals, it is unclear who would be the parties to such individualized proceedings. When an employer is willing to consent to the awarding of relief to a class, the only parties who would have an interest in challenging a class member's claim that he was a specific victim will be non-minority employees. If the federal government envisions a regime in which nonminority employees will stand in the shoes of the employer and attempt to show that the employer has not discriminated against a particular claimant—even though the employer does not contest the allegation of discrimination—it will have created a highly irregular system with obvious difficulties: it will be burdensome and costly to administer; it cannot be expected to yield reliable determinations; it allows groups of employees to usurp the functions of state and local government officials who were elected or appointed to serve the interests of the public; and it multiplies the divisiveness and disruption that settlements are intended to avoid.

The only alternative to individualized, employee-by-employee determinations is for a consent decree to prescribe some general criterion for determining who will receive relief. In some cases—if, for example, promotions are ordinarily made according to a wholly non-discretionary, mechanical process that an employer unlawfully refused to apply on one occasion—it may be possible to specify a general criterion that corresponds exactly to the class of victims of discrimination. But more commonly, it will be impossible to achieve such a precise fit. This will be true whenever the challenged employment decisions are made according to criteria that have a significant discretionary element; it will also routinely be true in the case of discrimination in hiring, where, as the Court has noted, some of the victims will be individuals who never even applied for positions because they were discouraged by the employer's discriminatory practices. *See Teamsters v. United States*, 431 U.S. 324, 362-67 (1977). In such cases, all that an employer will be able to do, if it wishes to settle the litigation, is to establish some general criterion for awarding relief that matches only imperfectly the class of actual victims.

Needless to say, it does not follow that a consent decree may provide for promotions or hiring on an irrational basis that bears no relationship to the class of possible victims. But existing safeguards ensure that no such decree will be entered. The Fourteenth Amendment and Section 703 prohibit an employer from adopting an affirmative action plan that unfairly discriminates against nonminorities or that is insufficiently related to remedying past illegal discrimination.[28] A district court will not enter a consent decree unless it satisfies itself—as the district court carefully did in this case—that the decree is reasonable, particularly in the way it treats persons who are not parties to the decree. And any consent de-

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[28] *See, e.g., United Steelworkers v. Weber*, 443 U.S. 193, 208-09 (1979); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976).

cree, of course, must be accepted not just by the employer but by the plaintiff. In any action brought on behalf of a class of victims, the district court will ensure that the named plaintiff is an adequate representative of the class (Fed. R. Civ. P. 23(a)(3), (4)), and the plaintiff will have a fiduciary responsibility faithfully to represent the interests of the class. The plaintiff therefore can be expected to withhold consent from any proposed decree that affords relief to a group that does not correspond reasonably closely to the class of victims.

b. Finally, irrespective of any requirement of victim-specificity that Section 706(g) may impose, no legitimate interest of petitioner or its members has been injured by the consent decree at issue in this case. That is because petitioner does not suggest that the *number* of minority firefighters who will receive promotions as a result of the consent decree is greater than the number who could reasonably have expected promotions if the City had not engaged in discrimination. Since the number of minority employees receiving promotions under the decree does not exceed the number who would have occupied higher positions in the absence of discrimination, petitioner's members are no worse off than they would have been if the City had never discriminated. They have no right to be placed in any better position than that.

The consent decree provides for race-conscious promotions only to the point where the ranks of lieutenant and above would be from 10 to 25 percent minority (Pet. App. A35-A36)—in a City with a minority population of 47 percent (J.A. 105). It was plainly reasonable for the City to conclude that, if it had never discriminated, 10 to 25 percent of the ranks of lieutenant and above would have been occupied by minorities. Indeed, petitioner does not and could not reasonably suggest otherwise. Petitioner's claim is only that the *identity* of the individuals who will benefit under the decree is not the same as the victims'. But petitioner has no legitimate interest in raising this claim. Nonminority employees will fare as well under the decree as they would have fared in the absence of discrimination—they will occupy all but 10 to

25 percent of the ranks of lieutenant and above. The fact that the minority employees in those ranks might not be precisely the same individuals as those who suffered from the City's discrimination does not prejudice the nonminority employees.

When, as will often be the case, it is impossible to identify the particular individuals who have been victims of discrimination, the job opportunities that those unidentifiable victims should have received constitute a kind of surplus—neither nonminority employees nor minority nonvictims are "entitled" to them, but the individuals who are "entitled" to them cannot be identified. In such a situation, the employer is faced with a choice between allowing at least some of those positions to be filled by nonminority employees—who unquestionably were *not* victims of discrimination—and awarding them to a class of minority individuals who may or may not have been victims of discrimination.

We do not by any means suggest that the employer is required to choose the latter course. But that course makes it more likely that the persons benefitted will be actual victims of discrimination, and it serves the important purpose—identified by Congress as one of the goals of extending Title VII to state and local governments—of increasing minority representation in state and local governments to the levels that would have been achieved if there had been no discrimination. In these circumstances—where no nonminority employee can claim that he is being denied a benefit he would have received in the absence of discrimination—nothing in Title VII precludes a state or local government from making this choice.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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January 24, 1986

AMICUS CURIAE

BRIEF

No. 91-1999

Supreme Court, U.S.
FILED
JAN 24 1992
CLERK

In the

Supreme Court of the United States

October Term, 1991

Local 93, International Association of Firefighters, AFL-CIO, C.L.C.,

Petitioner,

v.

City of Cleveland, *et al.*

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on writ of certiorari to the united states court of appeals for the sixth circuit

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BRIEF AMICI CURIAE OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC., NATIONAL URBAN LEAGUE, INC., PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC., ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, INC., AND THE NEW JEWISH AGENDA

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QUESTIONS PRESENTED

(1) Are race conscious or numerical remedies necessary to redress, prevent or deter racial discrimination?

(2) Was the race conscious numerical remedy in this case reasonably framed to redress or prevent continuation of the alleged and admitted discriminatory practices?

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No. 84-1999

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

LOCAL 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, et al.,

Petitioners,

v.

CITY OF CLEVELAND, et al.,

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC., NATIONAL URBAN LEAGUE, INC., PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC., ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, INC., AND THE NEW JEWISH AGENDA

INTEREST OF AMICI*

The interest of amici are set forth in our brief in Local 28, Sheet Metal Workers v. EEOC, No. 84-1656.

SUMMARY OF ARGUMENT

1. Over the last two decades federal district judges have repeatedly concluded that, on the specific facts of the circumstances before them, numerical remedies were necessary to redress, prevent or deter discrimination. The decisions to adopt such numerical remedies have reflected an intensely practical response to persistent discrimination by often intrasigent defendants. These numerical remedies have been utilized in

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* Letters from the parties consenting to the filing this brief have been filed with the Clerk.

six categories of cases; in each instance they served to assure redress for past victims, or to prevent or deter discrimination or further harm to future victims.

The Solicitor General describes as paradigms of "non-quota" relief 3) Justice Department consent decrees. In fact, however, these decrees are replete with numerical remedies. The numerical provisions contained in Justice Department decrees include the following: (1) orders specifying that a particular number of rejected applicants will receive preferential hiring treatment, (2) orders setting a numerical ceiling on the number of persons entitled to "preferential job offers" that a defendant need actually hire, (3) orders setting specific percentages of blacks, Hispanics, Indians or women that a defendant is required to recruit and "expected" to hire, (4) orders

requiring that the percentage of minorities hired on the basis of a non-job related test shall be the same as the percentage of minorities taking that test. The use of such orders makes clear that even the Justice Department recognizes that numerical remedies are at times a practical necessity.

II. We agree with the Solicitor General that the parties to a Title VII action may resolve by settlement both the merits of that action and the identity of the individuals who are to benefit from a consent decree. In weighing a proposed decree a court need not and should not conduct a trial to determine either the merits of the case of the identities of the victims of any discrimination. A consent decree should be approved so long as the type of relief it provides, and the method for selecting the beneficiaries of the decree, are reasonable.

In this case the petitioner union actually helped to draft the provisions of the decree specifying the designated beneficiaries of the injunctive relief. Petitioner subsequently objected that the decree was a "quota", but never contended that the decree should have designated different beneficiaries. In light of the wide variety of discriminatory practices alleged in the complaint, the group designated as eligible to benefit from the decree -- minority firefighters hired prior to December 1982 -- was reasonable.

ARGUMENT

I. NUMERICAL REMEDIES ARE AT TIMES NECESSARY TO REDRESS, PREVENT OR DETER DISCRIMINATION

A. The Remedial Experience of the Lower Courts

Section 706(g) gives federal courts broad authority to enforce Title VII because Congress correctly anticipated

that the enforcement of Title VII would involve exceptionally difficult remedial problems. Although many employers and unions voluntarily complied with federal law, others embarked on protracted and intransigent efforts to keep their employees or members all-white or all-male. General injunctions which merely parroted the language of Title VII itself had little if any impact on such defendants. Such massive resistance to the requirements of Title VII sorely tested the patience, resolve and ingenuity of federal judges responsible for enforcing the law. Correcting violations by non-intransigent defendants also posed complex practical problems.

The use of race conscious and numerical remedies emerged over a period of years as federal judges continued to be confronted by circumstances in which other remedies proved insufficient to promptly

redress, prevent or deter violations of Title VII.[1] The use of those remedies emerged as a pragmatic judicial response to the complex and often intractable problems that arose in enforcing Title VII.

Because race conscious and numerical remedies were developed to deal with a variety of types of violations and defendants, those remedies have not taken any single form. Such remedies have differed significantly in their purpose, terms, and duration. The diversity of race conscious and numerical remedies which the lower courts have devised reflects a similar diversity in the practical problems that have arisen in

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[1] A number of the cases described in this section involve constitutional rather than Title VII claims. Where intentional discrimination is involved in a Title VII case the practical remedial problems are similar to those in a Fourteenth Amendment case.

implementing Title VII. We set out below a brief summary of the types of circumstances in which federal courts have concluded that race conscious or numerical orders were necessary to redress, prevent or deter violations of Title VII:

(1) The earliest race-conscious numerical orders were framed to deal with employers and unions whose past intentional violations of Title VII were so egregious as to make clear that they simply would not obey a general injunction against discrimination. Such compliance orders were issued in NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974), and Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974) (en banc), only after prior injunctions, forbidding discrimination and requiring affirmative recruitment efforts, had proved ineffective in ending illegal conduct. In NAACP v. Allen, for example, almost two years after the issuance of

such a detailed injunction containing no numerical remedies, the Alabama state police still had not hired a single black. 340 F.Supp. 703, 705 (M.D. Ala. 1972). Where a defendant is determined to continue to violate the law, a general injunction against discrimination provides a plaintiff no remedy at all, but only an opportunity to return to court at a later date to prove that the defendant had found some new method to exclude minorities or women. Numerical compliance orders were effective in such situations because they deterred a wide range of discriminatory practices, not by attempting to enumerate them all, but by forbidding the effect -- the hiring or promotion of few if any minorities or women -- that would result from any type of systematic discrimination. Such an order shifted from the court and plaintiff to the defendant the

burden of identifying and correcting specific discriminatory practices or officials.[2]

(2) In a variety of circumstances district courts have concluded that proven discrimination was the inevitable result of the race or sex of individuals holding key positions in a company or union, and that prompt and certain eradication of continuing discrimination required an alteration of the group of individuals who played a critical role in personnel actions. Procedure neutralization orders were thus issued directing that specified

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2 See e.g., Heat & Frost Insulators v. Vogler, 407 F.2d 1047, 1055 (5th Cir. 1969)(numerical order necessary to prevent "subversion of the purpose of the injunction"); United States v. Lee Way Motor Freight, Inc., 625 F.2d 918, 944-45 (10th Cir. 1979)(numerical order necessary to "prevent possible repetition of the long and arduous lawsuit with which we are now involved"); cf. Contractors Association v. Secretary of Labor, 442 F.2d 159, 173, 177 (3d Cir.) (Philadelphia Plan necessary to end discrimination by federal contractors), cert. denied 404 U.S. 854 (1971).

numbers of minorities or females be included among officials responsible for recruiting new applicants,[3] considering appeals of rejected applicants,[4] training newly hired workers,[5] and, more broadly, evaluating all hiring and promotions.[6] Such orders were upheld as "an effective method to prevent future discrimination".[7] Several circuits concluded that in some situations the unlawful deterrent effect of an employer's well deserved reputation for discrimination could only be dissipated by a court ordered increase in the

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3 Commonwealth of Pennsylvania v. Rizzo, 13 FEP Cas. 1475, 1481 (E.D. Pa. 1975).

4 Id.

5 Williams v. City of New Orleans, 543 F. Supp. 662, 682 (E.D. La. 1982), aff'd 729 F.2d 1554 (5th Cir. 1984) (en banc); United States v. Operating Engineers, 4 FEP Cas. 1088, 1097 (N.D. Cal. 1972).

6 Ostapowicz v. Johnson Bronze Co., 12 FEP Cas. 1230, 1232 (W.D. Pa. 1976).

7 Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 402 (3d Cir. 1976).

number of minority or female employees.[8] In Taylor v. Jones, 495 F.Supp. 1285 (E.D. Ark. 1980), aff'd, 653 F.2d 1193 (8th Cir. 1981), the black plaintiff had been driven from her position as one of the Arkansas National Guard's few minority workers by a long history of racial harassment. The trial court held that full relief required more than an order reinstating Taylor in a job involving the same "appalling conditions." 495 F.Supp. at 1294. The judge found that, at the offices of the Guard,

> as the environment approaches a fairer racial representation, the degree of racism tends to diminish.... [Plaintiff] has standing not only to seek reinstatement, but to seek reinstatement in a work place where all people are treated with decency and respect. The Court finds that this goal will be materially impeded unless the Arkansas National Guard is required to step up its employeent of qualified black

[8] Association Against Discrimination v. City of Bridgeport, 594 F.2d 306, 311 n. 13 (2d Cir. 1979); NAACP v. Allen, 493 F.2d at 617-21; Carter v. Gallagher, 452 F.2d 315, (8th Cir. 1971).

> persons.... There simply is no other way to ensure that the law will be complied with in the future.

495 F.Supp. at 1294.[9] Accordingly, the district court imposed a numerical hiring order.

(3) Griggs v. Duke Power Co., 401 U.S. 424 (1971), forbids the use of a test or other employment selection procedure that has an adverse effect on minorities or women, unless that test or procedure is demonstrably job related. In a case where a court has declared a disputed test unlawful, the fashioning of a new test that will be job related is often a time consuming task. While such an examination is being developed, an employer may well need to continue hiring or promoting additional employees. In the case of public agencies, particularly

[9] See also Sosna v. Iowa, 419 U.S. 393, 414 n.1 (1975) (White, J., dissenting).

police and fire departments, continued hiring and promotions are often vital to the safety of the community. In such situations, pending the development and approval of a new test, courts have issued test neutralization orders, permitting the use of the old test provided that it is utilized in such a way as to avoid any illegal adverse impact on minorities or women. Ordinarily this is done by hiring or promoting a number of minorities or women commensurate with the proportion of minorities or women who took the illegal test.[10] Such test neutralization orders, like compliance orders and procedure

[10] See, e.g., Berkman v. City of New York, 536 F.Supp. 177, 216-18 (E.D. N.Y. 1982), aff'd 705 F.2d 584, 595-97 (2d Cir. 1982); Ensley Branch, NAACP v. Seibels, 14 FEP Cas. 670, 686-87 (N.D. Ala. 1977); Commonwealth of Pennsylvania v. Rizzo, 13 FEP Cas. 1468, 1474 (E.D. Pa. 1974); Reed v. Lucas, 11 FEP Cas. 153, 155-56 (E.D. Mich. 1975); Guevano v. Campbell, 93 F.R.D. 68, 79-80 (D.D.C. 1981).

neutralization orders, protect potential victims of discrimination from future violations of the law.

(4) In some cases numerical orders are necessary to identify the individuals entitled to redress for past discrimination. This can occur in a variety of ways. In the case of a Griggs violation, a test is only unlawful because it has an adverse effect on minorities or women, eliminating a disproportionate number of them from consideration for employment or promotion. Thus the difference between the number of minorities or women promoted or hired and the number who would have been promoted or hired had there been no adverse impact will at times be the most appropriate measure of the number of victims. A numerical order must therefore

be used in such situations to calculate the number and thus determine the identity of the individuals entitled to relief.[11]

The method of discrimination utilized by an employer may obscure the identities of the victims of that violation, particularly where the employer is successful in discouraging minorities or women from applying for the disputed positions. Teamsters v. United States, 431 U.S. 324, 365 (1977), provides that in a case of systematic discrimination all rejected individuals, and all those who were deterred from applying, are to be treated as victims unless the defendant can prove otherwise. A mechanical application of Teamsters, however, could lead a court to identify as victims a number of individuals substantially in excess of the actual number of vacancies that were the subject

[11] See, e.g., Berkman v. City of New York, 705 F.2d at 596-97.

of the original violation, especially where there were large numbers of rejected or deterred applicants. For that reason courts have attempted to estimate, as accurately as circumstances may permit, the number of minorities or women who would have been hired or promoted but for the proven discrimination. Here, as in the case of a Griggs violation, the use of such a victim identification order is essential to framing redress that is fair to whites and males as well as to the arguable victims.

(5) Under Teamsters and Franks v. Bowman Transportation Co., 424 U.S. 747 (1976), the victims of a past act of discrimination are ordinarily entitled to an absolute priority in appointment to whatever positions were unlawfully denied at an earlier time. In some instances, however, the process of identifying those victims is a difficult one. Because of

the unavoidable uncertainty in those cases as to whether the group which will benefit from the decree is precisely the same as the group of past victims, courts have upon occasion reduced the degree of preference accorded to those beneficiaries. Thus, instead of the normal practice of setting aside all vacancies for past victims, only 33% of future vacancies were set aside for the beneficiaries of the decree in Carter v. Gallagher, 452 F.2d 315, 331 (8th Cir. 1971). Such numerical orders have the effect of delaying the date on which victims are returned to their rightful places in the workforce.

(6) This Court has repeatedly noted that acts of discrimination can injure indirect as well as direct victims. In Rogers v. Paul, 382 U.S. 198, 200 (1965), the Court held that black students were entitled to challenge racial discrimination in faculty personnel policies, noting that such discrimination inherently denied black students equality of educational opportunity. The Court has twice recognized that housing discrimination can injure, not only blacks denied access to homes and apartments, but also the existing residents, black and white, of the neighborhoods involved. Gladstone Realtors v. Bellwood, 441 U.S. 91, 100-02 (1979); Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 208-12 (1972). Congress amended Title VII in 1972 to prohibit employment discrimination by public agencies precisely because it too was concerned about the indirect victims of discrimination; the House and Senate reports emphasized that an all-white agency workforce resulting from such

discrimination is likely to harm minority citizens who deal with and depend on the agency involved.[12]

The lower courts have repeatedly found that past racial discrimination in the selection of public employees, particularly teachers, firefighters, and police officers, causes ongoing harm to the public, especially non-white citizens, even after that discrimination may have ended.[13] These findings have not been premised on any view that only minority employees should service minority citizens, a view which amici expressly

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[12] S.Rep. No. 94-415, 10 (1971); H.R. Rep. No. 92-238, 17 (1971).

[13] See e.g., Kromnick v. School District of Philadelphia, 739 F.2d 894, 904-06 (3d Cir. 1984)(teachers); Morgan v. O'Bryant, 671 F.2d 23, 27 (1st Cir. 1982) (teachers); NAACP v. Beecher, 679 F.2d 965, 977-78 (1st Cir. 1982), vacated 461 U.S. 477 (1983) (firefighters); Williams v. Vukovich, 720 F.2d 909, 923-24 (6th Cir. 1983)(police officers); Bridgeport Guardians, Inc. v. Civil Service Commission, 482 F.2d 1333, 1341 (2d Cir. 1973).

disavow. Rather, the courts have recognized that an agency policy of discrimination in employment can foster a similar agency policy of discrimination, brutality or insensitivity towards the group excluded from employment.

Such continuing injuries to indirect victims might readily be ended if the original direct victims could be found and placed in the agency involved. But often, especially in the case of hiring discrimination, the forms of unlawful conduct utilized by an employer make it impossible to locate the original direct victims. Even where those direct victims can be found, they are likely to have found other work and no longer want the position which was originally unlawfully denied.

Where, for either reason, it is impracticable to restore the original direct victims to their rightful places, the failure to do so leaves the indirect

victims subject to the same continuing injuries that were occasioned by the original act of discrimination. In such cases the lower courts have recognized that the indirect victims were entitled to a remedy that would bring an end to those continuing injuries by eliminating the effect of past discrimination on the racial composition of the public agency's workforce. Such remedies, which benefit the indirect although not the direct victims of the Title VII violation, are at times race conscious or numerical in nature.

We do not, of course, suggest that every district court order regarding numerical or race conscious remedies has necessarily been correct. Some of these orders may have been needlessly stringent, while others may not have been sufficiently strong. The appropriateness of each order turned, at least in part, on the

nature of the particular violation involved. The overall pattern of judicial decrees, however, makes clear that federal judges under a wide variety of circumstances have found such remedial measures to be a practical necessity.

We recognize that it may often be possible to promptly redress, prevent and deter violations of Title VII without resort to either numerical or race conscious remedies. Where such remedies are needed, courts will at times be required to strike a difficult balance between assuring, on the one hand, that violations of Title VII are effectively and promptly redressed, prevented and deterred, while seeking to minimize, on the other hand, the extent to which achieving these ends may adversely affect the interests of whites or men who may not have benefitted from past acts of discrimination. A certain amount of trial and

error may be unavoidable, since a resolution of these issues often requires a court to predict how a defendant or others will act in the future. But where a court concludes that a numerical order is the most effective way to redress, prevent or deter discrimination, the court need not and should not experiment first with alternatives it believes to be less efficacious. District courts must exercise considerable flexibility in administering Title VII remedies, relaxing the terms of decrees which time has shown to be unrealistic, or strengthening decrees that have proven ineffective. United States v. Montgomery County Board of Education, 395 U.S. 225, 234-38 (1969).

B. The Justice Department Consent Decrees Relied on by the United States

The Solicitor General, in arguing that remedies he characterizes as "quotas"

are never necessary, relies heavily on 33 Title VII Justice Department consent decrees,[14] which the Solicitor describes as involving "exclusively victim-specific relief." (U.S. Amicus Br., 29-30) The Solicitor emphasizes in particular the consent decrees in United States v. Fairfax County, No. 78-862-A (E.D. Va.) and United States v. Nassau County, Civ. No. 77-C-1881 (E.D.N.Y.). These decrees, the Solicitor urges, demonstrate that it is possible to formulate effective remedies without resort to "quotas".

Whatever the Solicitor may mean by the term "quota" in this context, one thing is indisputable. The very consent decrees which the Solicitor asserts illustrate the non-necessity of "quotas" are in fact replete with numerical

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[14] A list of the decrees on which the government relies is set out in Appendix A to this brief. The decrees are cited in this brief by the name of the defendant.

remedies. We have lodged copies of the decrees in Fairfax County and Nassau County with the Clerk. The race conscious numerical remedies contained in these decrees, and which the Justice Department apparently regarded as essential to framing effective relief in those cases, include the following:

(1) The Nassau County decree uses a numerical order to designate the individuals who would be entitled to claim priority job offers. Paragraphs 60-71 of that decree were framed to provide redress for blacks and Hispanics denied jobs on the basis of an allegedly unlawful test. Although approximately 220 blacks had been rejected because of their test scores, paragraph 69 authorized relief only for "the seventy-seven (77) highest-scoring blacks and Hispanics." Although this numerical order is not explained in the decree, it roughly corresponds to the

percentage of white test-takers who scored high enough on the test to be eligible to be hired.

(2) The Solicitor asserts that the Fairfax decree provides "priority job offers to 650 claimants" (U.S. Amicus Br. 29), and that decree does indeed list by name over 650 claimants entitled to "priority job offers". (¶ 9, App. B). But the decree also sets a numerical ceiling of 107 on the number of claimants whom the county must actually hire. (¶ 11, App. E). Once the ceiling has been reached, none of the remaining individuals entitled to "priority job offers" are to get such offers at all. Similarly, the Nassau County decree identified 77 minorities and 141 females who were entitled to what the decree called "priority job offers", provided they met certain other requirements. (¶¶ 34, 39, 40, 43, 44, 45) But the defendant did not have to actually

hire all of those entitled to priority job offers. Rather, the decree provided that Nassau County was actually obligated to hire only 29 of the minorities and 65 of the women entitled to "priority job offers", even if a larger number qualified and accepted those offers. (¶¶ 46(d), 71(d)). Similar absolute numerical ceilings are utilized in a number of other consent decrees relied on by the Solicitor.[15]

[15] Anne Arundel Decree, ¶ 22(d), App. I (135 listed individuals, 15 jobs); Jefferson County Decree, ¶¶ 38, 39, 46 App. C, D, E, F, L (754 individuals, 102 jobs); Little Rock Decree, ¶ 17(a), App. B (79 individuals, 20 jobs); Maricopa Decree, ¶¶ 14(b)(1), 15 (a) (306 individuals, 18 jobs); Georgia Department of Transportation Decree, ¶ 23, App. I (ceiling of 68 jobs); Georgia Forestry Commission Decree, ¶ 23, App. G (ceiling of 34 jobs); Georgia Department of Natural Resources Decree, ¶ 22, App. F (ceiling of 20 jobs); Georgia Department of Public Safety Decree, ¶ 23, App. F (ceiling of 121 jobs).

(3) Both the Nassau County and Fairfax County decrees contain implementing numerical orders which provide that certain claimants, rather than receiving an absolute job priority, are to be phased in on a numerical basis. Under the Nassau County decree not all females receiving priority job offers were entitled to the next available vacancies; the decree specifies that the County is obligated to set aside only 30 seats in each recruit class for such individuals. Under the Fairfax County decree vacancies in certain jobs are all set aside for claimants; in other jobs, however, the decree specifies that the individuals entitled to priority job offers can claim only 50% of the vacancies, or only a proportion of the vacancies equal to the proportion of minorities in the relevant work force. (¶ 12).

(4) The Fairfax County decree deals with alleged hiring discrimination involving a wide range of county jobs, including police, firefighter and clerical provisions. The decree does not, however, attempt to match claimants with the particular position that was unlawfully denied. Rather, the decree places all claimants in a single pool, and gives them an equal right to priority consideration for certain vacancies. Those vacancies are set out in a separate Appendix to the decree, which allots a specific number of vacancies "by job category, race and sex" to this group. (¶ 11B).

(5) The Nassau County decree contains two test neutralization orders, requiring that if certain non-job related tests are utilized for additional hiring or promotion they will be used in a manner "without adverse impact upon blacks,

Hispanics and females." (¶¶ 8(a), 11). The evident meaning of these paragraphs is that the proportion of blacks, Hispanics or women selected for hiring or promotion on the basis of the test must be the same as the percentage of blacks, Hispanics or women who actually took the disputed test.

(6) The Nassau County decree contains several numerical provisions regarding general hiring and promotion practices. (a) Paragraph 15 requires the county to take all reasonable steps to assure that, among qualified applicants for sworn positions, at least 20% are black or Hispanic, and at least 25% are female.[16] Paragraph 16 in turn directs the county to select from this pool in a "fair and nondiscriminatory" manner, and recites that "[i]t is the expectation of the

[16] The specific percentages are incorporated by reference to certain discovery material.

parties" that, if the county obeys that requirement, the number of minorities and women actually hired will "approximate their proportions in the pool of qualified applicants". (b) Paragraph 23 requires the county to take all reasonable steps to assure that, among qualified applicants for non-sworn entry-level positions, at least 20% are black or Hispanic. Paragraph 25 states that the county

> shall fill all non-sworn entry-level positions... with qualified blacks and Hispanics ... at levels which approximate their interest in and ability to qualify for those positions....

(Emphasis added).

Paragraphs 16 and 23 do not specify what steps the county is to take to assure that the hiring of minorities and women is at the specified level. Paragraph 18 contains the following gloss:

> [T]he recruitment and appointment objectives ... are not and shall not be treated as quotas.... [T]he adoption and implementation of the appointment objectives ... do not obligate Nassau County to ... grant a preference to a less-qualified person over a more-qualified person, where qualifications are measured by selection procedures and criteria which have been validated in accordance with the Uniform Guidelines.

Paragraph 18, read literally, does not disavow an intent to require racial preferences among equally qualified applicants, or among applicants for whom the county has no validated job-related ratings.

Among the decrees relied on by the Solicitor, nine others have similar provisions, specifying precisely the minimum level of minority or female applicants to be recruited, and announcing an expectation that compliance with the decree will result in hiring at that level. We set forth the decrees, and specified percentages, in Appendix B to this brief. Four decrees require that, where internal promotions are made, the

defendant will "insure" that the proportion of qualified minority or female applicants is the same as in the pool of eligible employees, and recite an "expectation" that the actual number of promotions will be proportionate to the number of qualified minority or female applicants.[17] All of these decrees contain a disavowal insisting that the decree is not a "quota"; in most instances the language is the same as paragraph 18 of the Nassau County decree. The apparent effect of these disavowals is that, even though a defendant may find, as a practical matter, that preferential actions are necessary to meet the expected levels of hiring or promotions, the United States disavows, to some extent, legal responsibility for such actions.

[17] Indiana Decree, ¶ 6; Jefferson County (Cities) Decree, ¶ 11; Jefferson County Decree, ¶ 14; North Little Rock Decree, ¶¶ 7, 8.

(7) Although the Fairfax and Nassau County decrees appear to be fairly representative of the government decrees on which the Solicitor relies, some provisions found only in other decrees are worthy of note. Five decrees require that specified numbers of minorities or women be employed as recruiters of minorities or women, respectively.[18] The Farmington decree sets specific interim hiring goals for particular jobs for Indians, Hispanics and women; blacks and Asians are to be counted as either Indian or Hispanic. (¶ 8). The Burlington decree requires the city to provide counseling services "dedicated to the problems of women". (¶ 16) The North Little Rock decree provides that minority and female trainees "shall be assigned to work shifts in a

[18] Anne Arundel Decree, ¶ 11; Indiana Decree, ¶ 5; Little Rock Decree, ¶ 14; North Little Rock Decree, ¶ 15; Virginia Decree, ¶ 12(c).

manner which offers them the opportunity for support and consultation with other minority or female trainees and experienced officers."[19]

The numerical and race conscious provisions of these decrees are important for two distinct reasons. They demonstrate, first, that the Department of Justice, despite its frequently articulated opposition to what it labels "quotas", continues to regard numerical remedies as essential for the framing of Title VII decrees. Second, the Solicitor General, despite the broad language of his brief denouncing "quotas", may not in fact be seeking a decision of this Court prohibiting all forms of numerical relief, since the very decrees which the Solicitor points to as models of non-quota remedies are in fact replete with numerical

[19] ¶ 16y.

provisions. It is difficult to believe that the government is urging the Court to adopt an interpretation of Title VII which would invalidate the very decrees which the United States characterizes as paradigms of appropriate Title VII relief.

The Solicitor does not explain the basis on which he would distinguish the numerical provisions described above from those numerical devices which he denounces as "quotas". Because numerical remedies, including those in Justice Department decrees, serve a wide variety of purposes, it would not be difficult to imagine any number of different rules which would sanction some but not all numerical measures. But such rules cannot be grounded on the Title VII legislative history relied on by the Solicitor. The congressional comments regarding quotas are simply too vague to account for a distinction, for example, between the

numerical remedies in the Nassau and Fairfax decrees and the numerical remedies at issue in the instant litigation. We readily acknowledge that not all forms of numerical remedies are appropriate in every case, and that there are cases in which no numerical remedies at all would be justified. But the distinctions among the remedies, numerical or otherwise, warranted in each case must turn on the nature of the discriminatory practices there at issue, not on any congressional intent to bar all types of numerical remedies regardless of whether they might be needed to redress, prevent or deter violations of Title VII.

II. THE RACE CONSCIOUS NUMERICAL REMEDY IN THIS CASE WAS REASONABLY FRAMED TO REDRESS AND PREVENT CONTINUATION OF THE ALLEGED AND ADMITTED DISCRIMINATORY PRACTICES

A. The Applicable Legal Standards

The United States, although objecting

to the decree in this case, sets forth two general principles with which we concur. First, the United States asserts that a Title VII consent decree does not require either a judicial finding of discrimination, or a concession by the defendant that such discrimination occurred. (U.S. Amicus Brief, pp. 28-29). That conclusion is compelled by the clearly expressed congressional preference for voluntary resolution of Title VII litigation. Ford Motor Co. v. EEOC, 458 U.S. 219, 228 (1982). If defendants could not settle a Title VII claim without either publicly confessing that they had violated the law, or submitting to a plenary trial and judicial resolution of the liability issues, no employer would ordinarily agree to settle employment discrimination claims; voluntary resolution of such disputes, which Congress preferred, would be virtually impossible. In all other

areas of the law litigation can be settled without the need for proof or admission of culpability; Congress clearly did not intend to thwart the settlement of race and sex discrimination claims with obstacles which are never imposed on other litigants or cases. In any area of the law a court, in deciding whether to approve a proposed settlement as reasonable, should consider the strength of the plaintiff's claims, Reed v. General Motors Corp., 703 F.2d 170 (5th Cir. 1983); but that assessment should not lead to a full dress trial of the merits of the case.

The United States also asserts, correctly in our view, that the parties to a Title VII litigation may resolve by settlement the issue of which minorities or women were, or but for the decree would become, direct or indirect victims of discrimination. Such a settlement, the

government suggests, may either designate the beneficiaries of the decree by name, or establish criteria to be utilized by the parties to designate those individuals. (U.S. Amicus Brief, pp. 28-29 and n.25). There need not be a judicial determination that each beneficiary had been, or would be, a victim of discrimination, and the defendants need not concede that any individual was or would be a victim. The Justice Department consent decrees referred to at p. 29 of its brief never use the term "victim" to describe the individuals to receive benefits under those decrees.[20]

[20] The decree in United States v. County of Fairfax refers to those individuals as "claimants". Consent Decree, ¶¶ 6ii. The decree in United States v. Nassau County refers to those individuals by referring to the paragraph of the decree which establishes the criteria for selecting them. Consent Decree, ¶¶ 44-45, 58-59, 70-71.

If, as Congress intended, negotiated settlement is to remain a viable method for resolving Title VII litigation, the parties must be permitted to resolve by settlement the identities of the minorities or women to receive affirmative relief under such settlements. The relief that may be encompassed within a consent decree must be at least as broad as that which a plaintiff could win at trial. Any settlement, regardless of whether or not it involves numerical relief, may affect the interests of white or male employees. For that reason a court asked to approve a decree should provide interested individuals, including affected whites, an opportunity to be heard, and should carefully consider any objections which may be advanced, including objections by whites whose interests may be affected by the decree. But in assessing those objections a court need only inquire whether the

forms of relief or the designation of beneficiaries, depending on which may be challenged, are reasonable. Title VII neither requires nor authorizes such a court to conduct a trial to determine either the merits of the claims or the identities of the individuals who would have been entitled to relief in a fully litigated and adjudicated case.

The Solicitor General also appears to assert that even a so-called "victim specific" consent decree must be rejected if a court believes that the proposed decree conflicts with an applicable collective bargaining agreement. (U.S. Amicus Br., pp. 24-27). In this case, of course, the union never argued below that there was any such conflict. Had such an argument in fact been presented, the district court could not have resolved that objection without interpreting the collective bargaining agreement. But the

Memorandum of Understanding provides that the grievance and arbitration procedure established by the Memorandum "shall be the exclusive method of reviewing and settling disputes" about the meaning of the Memorandum.[21] Part of the agreement thus bargained for and agreed to by the city and union is that an arbitrator, and only an arbitrator, is to resolve any issues regarding the interpretation of the Memorandum. W.R. Grace & Co. v. Local 759, 461 U.S. 757 (1983), makes clear that in a case such as this the federal courts should not usurp the role which the signatories to a collective bargaining agreement have agreed will be played by an arbitrator.[22] 461 U.S. at 761-66. In this

[21] Memorandum of Understanding, Article XI: The relevant portions of the Memorandum are set forth in Appendix C to this brief.

[22] Judicial interpretation of such an argument might be appropriate under other circumstances, such as where the signatories all agreed that a court, rather than an arbitrator, could interpret the

case petitioner never submitted for arbitration any grievance concerning the effect of the decree on its contractual rights, and the deadline for filing such a grievance expired years ago.[23]

The circumstances of this case make evident the wisdom of the decision in W.R. Grace that such matters of interpretation should be resolved between the parties to an agreement under the procedures established by the agreement itself. It is far from clear that the disputed consent decree in any way violates the Memorandum of Understanding. Article VI of the Memorandum, which deals with promotions, sets no standards at all for selecting

decree, or where the decree, incorporated by reference a statute or constitutional provision.

[23] The union was obligated to file that grievance within 7 days of the disputed action, here, presumably, the signing or approval of the decree. Article XI, step 1.

those to be promoted, but merely provides that promotions are to be made under civil service procedures.[24] Since the City Civil Service Commission is a party to this litigation and has agreed to make promotions according to the terms of the consent decree, a literal reading of Article VI would appear to require, not forbid, obedience to the decree. In addition, Article XXIV states that it is the intent of the signatories that the entire Memorandum comply "with applicable legal statutes", a provision which appears to incorporate by reference the requirements of Title VII. If the Memorandum does indeed incorporate the substantive provisions of Title VII, then the Memorandum itself may obligate the city to take the actions specified by the decree. Nether the city nor the union has chosen

[24] Article VI is set out in full in Appendix C.

to invoke the grievance procedures established by the Memorandum to provide a definitive interpretation of Articles VI and XXIV.

Even if an authoritative interpretation of the decree existed and mandated some particular promotion standard or procedure, that would not preclude a court from approving the consent decree in this case. In W.R. Grace there was just such an interpretation, an arbitrator having held that a preexisting labor contract conflicted with a compliance agreement that the employer had entered into with the EEOC. This Court nonetheless made clear that the employer was obligated to obey both the compliance agreement and an injunction enforcing that agreement; the Court noted that the lower courts could if necessary use their contempt powers to secure such obedience. 461 U.S. at 769.

The reasons for that aspect of W.R. Grace are clear. A labor agreement which forbade an employer from ever settling any Title VII claim, and thus required the employer to litigate to the end practices which it knew were illegal, would certainly violate the "important public policy" of voluntary compliance with Title VII. 461 U.S. at 770-71. Equally contrary to public policy would be a labor agreement forbidding an employer from ever settling certain types of Title VII claims or from ever agreeing to particular types of relief for admitted Title VII violations. Where an employer believes its obligations under Title VII may conflict with its labor agreements, the employer must conform its practices to the requirements of federal law.

The priority accorded to applicable federal law, and to the Title VII policy in favor of voluntary compliance, do not

necessarily leave without redress a union whose collective bargaining agreement may be violated as a result of such voluntary compliance. W.R. Grace strikes the balance between possibly conflicting Title VII and collective bargaining obligations by directing that an employer conform its practices to what it reasonably believes to be the requirements of Title VII, while recognizing that the union may be entitled to seek monetary relief as a result. 461 U.S. at 766-7723. Thus a union may be entitled to win back pay for members adversely affected by contract violations that were occasioned by compliance with a valid conciliation agreement or consent decree. "Compensatory damages may be available to a plaintiff injured by a breach of a [collective bargaining agreement] even when specific performance of the [agreement] would violate public policy". 461 U.S. at 769 n.13. Under

W.R. Grace the mere existence of a conciliation agreement or consent decree does not by itself "nullify [a] collective bargaining agreement"; where such a labor agreement is violated, the union may seek to enforce its contractual rights in any way that would not obstruct or deter compliance with the conciliation agreement or consent decree. This formula leaves an employer free to promptly abandon and redress perceived violations of Title VII, while permitting a union to litigate the question of who should ultimately bear the burden of any compliance action which violated the contractual rights of its members.

In W.R. Grace this Court recognized that the employer was obligated to obey a conciliation agreement that violated a labor contract, while sustaining a back pay award for the resulting contractual violation. The Court's opinion noted that

under some circumstances public policy might be violated by such a back pay award, but found no such public policy problems under the particular circumstances of that specific case. In the instant case, the union has never alleged, or sought to litigate through arbitration, any claimed violation of its Memorandum of Understanding. A district judge, in approving a consent decree might also decide in under appropriate circumstances whether public policy would preclude back pay claims under the collective bargaining agreement, but the district judge in the instant case did not purport to do so. This appeal, accordingly, simply presents no issue regarding whether, under W.R. Grace, the Firefighters Union might be entitled to seek monetary relief for its white members.

B. The Basis of the Disputed Decree

An assessment of the reasonableness of a proposed settlement turns, in part, on the nature of the underlying claims which that settlement resolved.[25] The complaint in this action, in addition to a general allegation of intentional racial discrimination in promotions, alleged that Cleveland had engaged in three specific discriminatory practices: utilizing a discriminatory non-job related promotion examination; manipulating retirement dates to prevent promotion of minorities who passed that test; and refusing to give any promotion examination between 1975 and 1981, thus precluding promotions for minorities who were hired after 1973 and thus ineligible to take the 1975 test.

[25] In considering a proposed settlement a court should also look to the types of claims that may have emerged since the filing of the complaint.

(Complaint, ¶ 15) Plaintiffs also alleged that Cleveland had engaged in racial discrimination in hiring firefighters for entry level positions. (Id., ¶¶ 12-13). Plaintiffs asserted as well that the virtually all-white supervisors had discriminated in a variety of ways against minority firefighters.

Had plaintiffs established these claims at trial, minority victims of these practices would have been entitled to make whole relief, which would have included appointment to the positions they would have held but for that discrimination. Franks v. Bowman Transportation Co., 424 U.S. 747 (1976). Ordinarily such identified victims are entitled to be restored to their rightful places before any other promotions are made. Proven victims could thus have won an absolute preference for all future vacancies until the pool of victims was exhausted.

Were a court to award such make whole relief in a case such as this, there would be a number of distinct groups of arguable victims: (1) minority firefighters who failed the 1975 disputed examination; (2) blacks who passed the 1975 examination but were precluded from promotions by retirement date manipulation; (3) minority firefighters who were hired between 1973 and 1978 and were barred from promotion because the city refused to give a new promotion examination; and (4) minority firefighters who had earlier been unlawfully denied employment, and whose eligibility to promote had thus been delayed because of discrimination. In addition, promotion discrimination in 1975 could affect the promotions of individuals in later years, by altering the composition

of the firefighters with whom, for example, a 1980 hire would have to compete for a promotion vacancy.[26]

In addition, a prevailing plaintiff might have been entitled to a test neutralization order, forbidding Cleveland from relying on a non-job related test unless that test were utilized in a manner that eliminated its unlawful discriminatory impact. As a practical matter such orders require that employers using a non-job related test must hire or promote the same proportion of women or minorities that took the unlawful examination. The individuals who benefit from such decrees are the individuals who would have been

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[26] If in 1975 the defendant promoted a white with a rating of 80 over a black with a rating of 90, a black 1980 hire with a rating of 85 would be an indirect but very real victim of that discrimination, since the 1980 hire would be denied a promotion in 1985 if competing with the more senior blacks, rather than with the lower scoring white.

the victims of the unlawful examination had the results of that examination been utilized in an unadjusted and thus illegal manner. Such test neutralization orders are the only means to prevent new violations of Title VII, and injuries to new victims, where an employer needs to make additional hiring or promotion decisions before it has been able to develop a job-related test.

Compared to the types of decrees that might have been obtained had this case gone to trial, the consent decree at issue in this appeal is decidedly more flexible and the proportion of promotions affected is substantially smaller. The decree limits blacks who can benefit from its affirmative provisions to individuals

hired before December, 1982,[27] a month prior to the entry of the decree. Under the portion of the decree which remains in effect,[28] the designated individuals are not guaranteed any particular number or proportion of future vacancies. Rather, paragraph 13 of the decree requires that promotions be made in such a way as to "maintain" certain proportions among supervisory officers. Supervisory vacancies only arise when an existing supervisor retires or otherwise vacates a position. Where the retiring official is

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27 Paragraph 11 provides that the last examination affected by the decree will be that given on December 15, 1985. Firefighters are only eligible for promotion after three years of service.

28 The portions of the decree governing promotions in 1983-85 are no longer in effect. Since petitioners seek only to prevent future promotion decisions from being governed by the terms of the decree, we limit our comments to the provisions of the decree that will affect promotions between the present date and December, 1987, when the numerical aspects of the decree will expire.

white the consent decree is simply inapplicable, since the proportion of minorities in that job will not be reduced regardless of the race of the individual promoted to replace a white. The vast majority of retirees are in fact white, since there were virtually no blacks on the force until 15 years ago. Even if a black supervisor does leave his or her position prior to December, 1987, when the disputed provisions will expire, the decree will not apply unless his or her departure has brought the level of minority supervisors below the specified floor.

The decree has thus had only a limited impact; since March 1983 minorities have received only 7% of the promotions in the fire department, even though they constitute 14% of the city firefighters. Although the city did not reach the goals set for 1983-85, that did

not constitute a violation of the decree.[29] It is quite unlikely that a substantial portion of the vacancies to be filled in the next two years will be governed by the decree; indeed, whether any of those vacancies will be so affected is a matter of speculation.

Petitioner and the United States assert that "many" of the beneficiaries of the still operational portions of the decree could not have been victims of past discrimination. (U.S. Amicus Br., p. 3 n. 2). Were the sole justification advanced for the decree a desire to provide relief for victims of past discrimination, this objection, if substantiated, would raise significant questions about the reasonableness of the decree. But over the course of the protracted trial court proceedings in this case, petitioner never

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[29] Brief for Respondent Cleveland Vanguards, statement of the case.

raised or sought to prove any such claim. On the contrary, the provisions of the decree designating which minority individuals would be beneficiaries were negotiated and agreed to by the petitioner union itself. When the union ultimately objected to the proposed decree, it objected solely to the fact that the decree involved what the union branded a "quota", and expressed no objection whatever to the identities of the particular minorities who would benefit from the disputed provisions.[30] In view of the variety of ways in which the alleged discriminatory practices might have injured minority employees, the designation of individuals to benefit from the decree is certainly not unreasonable.

[30] Objections to Consent Decree, p. 3.

The decree in this case also operated in several ways likely to prevent future discrimination. The district judge concluded that integration of the virtually all-white supervisory positions would have a salutary influence on the entire department, and would encourage blacks and Hispanics to join an agency whose past discriminatory practices had deterred minority applications.

> Lets get these people promoted. And then we then plug in a substantial number of black leadership that can start having some influence in the operation of this fire department, and the other minorities that haven't sought these jobs before, and they are not going to see a significant number of minority officers and they are going to be attracted to some on the force. ... [I]f all of you do that this thing will naturally work itself rather than our having to constantly force it and plug it.

(J.A., p. 68). The City Director of Public Safety testified that an integrated supervisory force would result in better and fairer management of the agency, and

or male workers are understandably far more concerned with the number of vacancies affected by a decree than with the identities of the particular minorities or women who will benefit from that decree. Title VII litigants should remain free to negotiate settlements the varying details and precision of which reflect that priority.

increase his ability to assure "quality ... service" for all the citizens of Cleveland. (J.A. 50-51). Because the goal for each position approximated the proportion of minorities to be made, the decree operated as well to neutralize, at least in part, any adverse effect of promotion examinations. An increase in the number of minority supervisors was also likely to reduce discrimination by supervisors against minority firefighters.

The particular form of the instant decree may, of course, differ from the precise type of affirmative relief that a court might have awarded had the case gone to trial. But the parties to a negotiated settlement are not limited to trying to predict the specific formula that a court would have utilized, but should be free to develop other devices to balance the competing interests of all affected employees. As a practical matter, white

CONCLUSION

For the above reasons the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A

Justice Department Consent Decrees

The amicus brief of the United States in Firefighters v. Cleveland Vanguards refers to 33 consent decrees entered into by the United States. A list of those decrees, furnished to amici by the Department of Justice, is set out below. Although there are four Georgia consent decrees, the Department counted them as two decrees because the decrees were approved on the same date.

United States v. Anne Arundel County, No. R-85-4366, D. Md. (October 23, 1985)

United States v. City of Avondale, D. No. CIV.-84-2412 PHX EHC, D. Ariz. (December 27, 1984)

United States v. Buffalo Board of Education, No. CIV-83-366-C, W.D. N.Y. (September 17, 1984)

United States v. Burlington County College, CIV. No. 82-3255 (N.A.A.), D.N.J. (January 24, 1983)

United States v. Board of Education of the City of Chicago, Civil Action No. 83 C 8988, N.D. Ill. (February 22, 1985)

United States v. Board of Education of Community High School District 218, Civil Action No. 84 C 7238, N.D. Ill. (August 24, 1984)

United States v. Duquesne Light Co., Civil Action Nos. 75-1110 and 76-1620, W.D. Pa. (April 16, 1981)

United States v. County of Fairfax, Virginia, Civil Action No. 78-862-A, E.D. Va. (April 29, 1982)

United States v. City of Farmington, Civil Action NO. 80-837-C, D.N. Mex. (October 2, 1981)

United States v. State of Georgia and Georgia Department of Transportation, Civil Action No. C84-1574A, N.D. Ga. (June 28, 1985)

United States v. State of Georgia and Georgia Department of Public Safety, Civil Action No. C84-1575A, N.D. Ga. (May 30, 1985)

- 2a -

United States v. State of Georgia and Georgia Department of Natural Resources, Civil Action No. C84-1576A, N.D. Ga. (May 30, 1985)

United States v. State of Georgia and Forrestry Commission, Civil Action No. C84-1577A, N.D. Ga. (May 30, 1985)

United States v. City of Hazelwood, Civil Action No. 83-2289-C(3), E.D. Mo. (June 6, 1984)

United States v. State of Indiana, Civil Action No. IP 80-1272-C, S.D. Ind. (May 17, 1983)

United States v. Jefferson County, Civil Action No. 75-P-0666-S, N.D. Ala. (December 3, 1982) (cited as "Jefferson County Cities")

United States v. Jefferson County, Civil Action Nos. 75-P-0666-S and 74-P-0017-S N.D. Ala. (December 29, 1982) (cited as "Jefferson County")

United States v. Board of Education of City of Kingsport, No. CIV-2-83-316, E.D. Tenn. (September 27, 1983)

United States v. County of Lancaster, Nebraska, Civil Action No. 84-L-058, D. Neb. (January 9, 1985)

United States v. Sheriff of Lancaster County, Civil Action No. 83-0136R, E.D. Va. (May 6, 1983)

United States v. City of Little Rock, Civil Action No. LR-C-83-490, E.D. Ark. (June 17, 1983)

United States v. Maricopa County, CIV. No. 85-921 PHX WEC, D. Ariz. (September 11, 1985)

United States v. City of Marietta, Georgia, Civil Action No. C83-1875A, N.D. Ga. (September 15, 1983)

United States v. Maryland Department of Transportation, Civil Action No. 83-3669, D. Md. (November 10, 1983)

United States v. Nassau County, Civil Action No. 77-C-1881 GCP, E.D.N.Y. (April 21, 1982)

United States v. Nassau County, Civil Action No. CV-80-1054 (JBW), E.D.N.Y. (May 18, 1982)(cited as "Nassau County Sheriff")

United States v. City of Newport Beach, Civil Action No. 83-7585, C.D. Cal. (January 5, 1984)

United States v. State of North Carolina, Civil Action No. 83-1774-CIV(5) E.D.N.C. (December 22, 1983)

United States v. City of North Little Rock, Civil Action No. LR-C-82-300, E.D. Ark. (April 21, 1983)

United States v. City of Orange, Civil Action No. 84-12-44, C.D. Cal. (March 7, 1984)

United States v. City of Philadelphia, Civil Action No. 85-4485, E.D. Pa. (August 13, 1985)

United States v. City of Santa Barbara, Civil Action No. 84-0925-PAR, C.D. Cal. (February 23, 1984)

United States v. Commonwealth of Virginia, Department of Highways, Civil Action 82-0933-R, E.D. Va. (March 1, 1983)

United States v. City of Wadsworth, Ohio, Civil Action No. C-83-5168A, N.D. Ohio (March 16, 1984)

United States v. City of Willard, Civil Action No. C83-1156, N.D. Ohio (May 24, 1984)

APPENDIX B

Justice Department Consent Decree Expected Hiring Rates

(*Different rates for different positions)

Decree	Types of Rate	Rate
Duquesne Light, ¶7[1]	Black Laborers	15%
	Black Engineers	3.5%
	Women Laborers	12%
	Women Engineers	10%
Farmington, ¶ 7[2]	Indian	35%
	Hispanic	12%
	Women	35%
Ga.-Dept.of Trans. App. B [3]	Blacks	5%,10%, 20%,25%*
	Women	5%,10%,15%,19%,25%*
Ga.-Forrestry Comm'n.¶8[4]	Blacks	4%,20%,25%*
	Women	15%
Ga. Dept. of Natural Resources,¶8[5]	Blacks	20%,24%*
	Women	15%,18%,20%*

[1] Parties "anticipate" hiring level. ¶17.

[2] "Interim hiring goal". ¶7.

[3] "Objective" to "achieve" certain hiring levels. ¶7.

[4] "Objective" to "achieve" certain hiring levels. ¶7.

[5] "Objective" to "achieve" certain hiring levels. ¶7.

Ga.-Dept. of Pub.Safety[6]	Blacks	25%
	Women	15%
Indiana, ¶5[7]	Women	25%
Little Rock, ¶5[8]	Blacks	25%
	Women	16%
Nassau Cty. ¶¶15,24[9]	Blacks and Hispanics	20%
	Women	25%
N.Little Rock, ¶5. App. B[10]	Blacks	20%,25%,30%*
	Women	8%,10%,16%,25%*
Virginia,¶7[11]	Blacks	2%,3%,4%,6%,7% 8%,10%,12%,15% 18%,20%,25%,30% 30%,40%,45%,50%*
	Women	3%,4%,5%,6%,7% 8%,9%,10%,15%,16% 20%,25%30%,33%,35%*

[6] "Objective" "to "achieve" certain hiring levels. ¶7.

[7] "Expectation" as to hiring level. ¶7.

[8] "Expectation" as to hiring level. ¶7.

[9] "Expectation" as to hiring levels. ¶16 ; county "shall fill" vacancies with numbers "which approximate" portion of qualified minority applicants. ¶ 25.

[10] "Expectation" as to hiring levels. ¶8.

[11] "Expectation" as to hiring levels. ¶8. The percentages under this statewide decree vary both by job and by city.

APPENDIX C

Memorandum of Understanding
Between
City of Cleveland and Local 893,
International Association of Firefighters

ARTICLE VI

VACANCIES - PROMOTIONS

All promotions shall be made as outlined in the Civil Service Commission as mandated by the Civil Service rules and nothing herein shall be deemed to be repugnant to the Civil Service rules. However, it is the intent of the parties to this Memorandum of Understanding that where alternatives or discretion exist on the part of the appointing authority, that such discretion, choice, or selection shall be governed by objective standards and rules of reason. Disqualification on any promotion may constitute a grievance and shall be processed in accordance with the Grievance Procedure.

ARTICLE XI

GRIEVANCE PROCEDURE

It is mutally understood that the prompt presentation, adjustment and/or answering of grievances is desirable in the interest of sound relations between the employees and the City. The prompt and fair disposition of grievances involves important and equal obligations and responsibilities, both joint and independent, on the part of representatives of each party to protect and preserve the Grievance Procedure as an orderly means of resolving grievances. Actions by the City or the Union which tend to impair or weaken the Grievance Procedure are improper.

A grievance is a dispute or difference between the City and the Union, or between the City and the employee concerning the interpretation and/or application

of and/or compliance with any provision of this Memorandum of Understanding, including any and all disciplinary actions, and when any such grievance arises, the following procedure shall be observed.

STEP 1.

Except as specified in Step 1-A below, all grievances must be initiated in writing withn seven (7) calendar days after the event giving rise to such grievance.

• • •

STEP 2.

If the grievance is not satisfactorily settled at STEP 1, the Union may within five (5) calendar days after receipt of STEP 1 answer, appeal in writing to the Chief. The Chief shall review the grievance, STEP 1 answer and appeal, and give written response to the appeal to the Union President within five (5) calendar days.

STEP 3.

If the grievance is not satisfactorily settled at STEP 2 the Union may, within five (5) calendar days after receipt of the STEP 2 answer, appeal in writing to the Safety Director. The Safety Director or his designee, which may include representatives of the Department of Personnel, shall meet with the Local Union Presnt, or designee, and Secretary or designee (and steward if necessary) within five (5) calendar days after the grievance is submitted to the Director, and a written answer shall be given to the Local Union President (personally or by mail) within five (5) calendar days after the STEP 3 meeting.

STEP 4.

If the grievance is not satisfactorily settled at STEP 3, the Union may within ten (10) calendar days after receipt of the STEP 3 answer, refer the

dispute to the Joint Appeal and Review Board. The representatives from the Union and not more than two (2) representatives from the City, and the Board shall meet at least once a month at a time mutally agreeable in order to (a) review and attempt to settle unresolved grievances, if any, and (b) discuss matters of mutual interest relating to the employees covered by this Memorandum. A written answer to each grievance shall be given to the Union President (personally or by mail) within ten (10) calendar days after the STEP 4 meeting.

STEP 5.

If the grievance is not satisfactorily settled, at STEP 4, the Union may, within thirty (30) calendar days after receipt of the STEP 4 answer, submit the matter to arbitration. The Union shall notify the American Arbitration Association and the City at the same time of its

intent to appeal the grievance. The arbitrators shall be chosen in accordance with the rules of the American Arbitration Association. The fees and expenses of the Arbitrator shall be borne equally by the City and the Union. Furthermore, the aggrieved employee, his steward, and any necessary witnesses shall not lose any regular straight time pay for time off the job while attending an arbitration proceeding.

In the event a grievance goes to arbitration, the arbitrator shall have jurisdiction only over disputes arising out of grievances as to the interpretation and/or application and/or compliance with the provisions of this Memorandum, including all disciplinary actions and in reaching his decision, the arbitrator shall have no authority (1) to add to or subtract from or modify in any way any of the provisions of this Memorandum; (2) to

intent to appeal the grievance. The arbitrators shall be chosen in accordance with the rules of the American Arbitration Association. The fees and expenses of the Arbitrator shall be borne equally by the City and the Union. Furthermore, the aggrieved employee, his steward, and any necessary witnesses shall not lose any regular straight time pay for time off the job while attending an arbitration proceeding.

In the event a grievance goes to arbitration, the arbitrator shall have jurisdiction only over disputes arising out of grievances as to the interpretation and/or application and/or compliance with the provisions of this Memorandum, including all disciplinary actions and in reaching his decision, the arbitrator shall have no authority (1) to add to or subtract from or modify in any way any of the provisions of this Memorandum; (2) to

pass upon issues governed by law; or (3) to make an award in conflict with law. The Arbitrator shall issue a decision within thirty (30) days after submission of the case to him.

The Grievance Procedure set forth in this Memorandum shall be the exclusive method of reviewing and settling disputes between the City and the Union and/or between the City and an employee (or employees), exclusive of the election set forth in STEP 1-A, and all decisions of arbitrators shall be final, conclusive and binding on the City, the Union, and the employees. A grievance may be withdrawn by the Union at anytime and the withdrawal of such grievance shall not be prejudicial to the filing of future grievance, even if on the same subject matter.

a policy grievance which affects a
ential number of employees may
ally be presented by the Union at
of the Grievance Procedure.

The time limits set forth in the
ance Procedure shall, unless extended
tual written agreement of the City
the Union, be binding, and any
ance not timely presented, or timely
ssed thereafter, shall not be
dered a grievance under this Memoran-
and shall not be considered a grie-
under this Memorandum and shall not
bitrable. Any grievance not timely
ssed by the City at any of the
ding steps may be immediately
rred by the Union to STEP 4 for
sition.

Calendar days as provided within the
ance Procedure shall not include
days, Sundays or holidays.

ARTICLE XXIV

LEGALITY AND SEPARABILITY

It is the intent of the City and the Union that this Memorandum comply, in every respect, with applicable legal statutes, charter requirements, governmental regulations which have the effect of law and judicial opinions and if it is determined by proper authority that any provision of this Memorandum is in conflict with law, that provision shall be null and void.

AMICUS CURIAE

BRIEF

Nos. 84-1656 and 84-1999

Supreme Court, U.S.
FILED
JUN 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

Supreme Court of the United States

OCTOBER TERM, 1985

LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, *et al.*,

Petitioners,

—v.—

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*,

Respondents.

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, etc.,

Petitioner,

—v.—

CITY OF CLEVELAND, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND SIXTH CIRCUITS

BRIEF AMICI CURIAE

For NOW Legal Defense and Education Fund; California Women Lawyers; Employment Law Center; Equal Rights Advocates; League of Women Voters of the United States; National Women's Law Center; Northwest Women's Law Center; Wider Opportunities for Women; Women Employed; Women's Law Fund; Women's Law Project; National Bar Association, Women Lawyer's Division, Greater Washington Area Chapter; Women's Legal Defense Fund

IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICI CURIAE*

The NOW Legal Defense and Education Fund and other Amici are organizations dedicated to securing equal rights for women before the law.**

STATEMENT OF THE CASES

Amici adopt the two Statements of the Case as set forth by the respondents in the instant cases.

SUMMARY OF ARGUMENT

Title VII permits and contemplates race-conscious relief, which is of vital importance in tackling the dual problems of individual prejudice and systemic discrimination against minorities and women in employment. The language of Title VII read as a whole, the legislative history of the statute, Supreme Court precedent and over

* Letters of the parties reflecting their consent to the filing of this brief are being filed with the Court.

**Descriptions of these organizations appear in the Appendix to this brief.

twenty years of lower court decisions all support this position. Petitioners' argument that race-conscious, class-based relief violates Title VII is based on a faulty reading of selected extracts from the legislative history and from Supreme Court cases.

Nor does race-conscious relief violate the 14th Amendment to the United States Constitution. Analysis of the opinions of the Justices of this Court in University of California Board of Regents v. Bakke, 438 U.S. 265 (1978), Fullilove v. Klutznik, 448 U.S. 448 (1980), and a series of school desegregation cases, reveals that the Constitution permits such relief, and that such relief is crucial for ending discrimination.

The importance of race-conscious relief is highlighted by an examination of the position of women in the

workforce. While women have made substantial gains, they are still overrepresented among the poor and in low-paying jobs. Recent studies show that race and sex-conscious affirmative action has a positive impact on female and minority employment. The fashioning of the most complete relief possible under Title VII, including race and sex-conscious relief, must be continued and encouraged.

ARGUMENT

I. TITLE VII IS A BROAD REMEDIAL STATUTE WHICH PERMITS BOTH MAKE-WHOLE RELIEF TO IDENTIFIED VICTIMS OF DISCRIMINATION AND AFFIRMATIVE RACE-CONSCIOUS RELIEF TO REMEDY CLASS-BASED DISCRIMINATION.

The instant cases present squarely the question whether Title VII permits race-conscious relief. Petitioners and the United States as amicus curiae argue that relief under Title VII may never take race into account; rather, they urge it must be

color-blind and restricted to making whole identified victims of discrimination. This argument is without merit, and conflicts not only with the language and legislative history of Title VII, but also with over twenty years of interpretation of Title VII by this Court and the lower federal courts.

A. Sections 703(j) and 706(g), Read Together, Permit Race-Conscious Relief To Remedy Violations Of Title VII.

Title VII was enacted as a broad remedial statute intended to provide far-reaching relief from discrimination, and to "open employment opportunities for Negroes in occupations which have been traditionally closed to them."[1] The Act tackles the dual problems of individual prejudice and institutionalized systemic

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[1] 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey).

discrimination against minorities and women.[2] As established by this Court in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), Title VII was intended to provide both affirmative class-based relief and individual make-whole relief:

> As the Court observed in Griggs v. Duke Power Co., 401 U.S. at

---

[2] In 1972, during the debate on the 1972 amendments to Title VII, Senator Moss acknowledged the breadth of discrimination against women, minorities, and other protected classes:

> We have discovered that the promises in the 1964 Civil Rights Act were just a beginning... We have learned since that date that job discrimination is more pervasive and subtle than we supposed; an examination of the discussion in 1964 reveals that we were naive about such discrimination, thinking that voluntary compliance and conciliation would be enough to stop the prejudicial activities of most, and that those who blatantly and defiantly excluded others from the opportunity to work would be stopped by court action. We now know that the problem is much deeper.

Legislative History of the Equal Employment Opportunity Act of 1972, p. 1554.

> 429-430, the primary objective was a prophylactic one: 'It was to achieve equality of opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.'..It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination.

422 U.S. at 417-18 (emphasis added).

The text of Title VII itself underscores this dual purpose. The statutory sections governing liability and relief, particularly §§ 703(j) and 706(g), contemplate the use of race in fashioning remedies for illegal discrimination.

Section 706(g), the remedial section of the Act, provides in part:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of

> employees, with or without backpay . . . or any other equitable relief as the court deems appropriate. . . .

The section thus leaves the precise method of remedying discrimination largely up to the broad discretion of the district court, which is free to tailor relief to fit the specific discriminatory practice.[3]

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[3] Thus, employment goals have been expressed in terms of specific numbers or ratios, United States v. Wood, Wire and Metal Lathers Int'l Union, Local 46, 471 F. 2d 408, 412-13 (2d Cir.), cert. denied, 412 U.S. 939 (1973) (minimum of 100 work permits to be issued to non-whites; 250 permits to be issued annually on a "one-to--one" basis, black to white, through 1975); Plans may be very detailed, Boston Chapter, N.A.A.C.P., Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975) (program of race-conscious relief which involved pooling of minorities and non-minorities in four separate groups, with hiring on a one-to-one basis from the first two groups until the minority group was exhausted, followed by hiring from the other two groups until local fire departments attained sufficient minority fire fighters to have a percentage of the force approximately equal to the percentage of minorities in the locality). Alternatively, the precise details may be left very vague, Chisholm v. United States Postal Service, 665 F.2d 482, 498-99 (4th

The only limitation on the power of a court to order relief is articulated in the final sentence of § 706(g) and pertains solely to make-whole relief:

> No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee... if such individual was refused admission, suspended or expelled, or... discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 704(a) (emphasis added).

42 U.S.C. § 2000e - 5(g) (1978). Petitioners contend that this sentence bars remedial race-conscious relief. However, the language itself of the sentence reflects that the Congress was only imposing a limitation on make-whole relief to individuals, and was not in any way

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Cir. 1981) (U.S.P.S. ordered to make "affirmative efforts" to recruit, appoint and promote qualified black persons, using as its goal the percentage of black persons in the Charlotte U.S.P.S. work force).

circumscribing race-conscious relief which is class base . Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576 (1984) ("Title VII precludes a district court from displacing a non-minority employee with seniority under the contractually established seniority system absent either a finding that the seniority system was adopted with discriminatory intent or a determination that such a remedy was necessary to make whole a proven victim of discrimination." 81 L.Ed.2d 483, 497 n.9 [emphasis added].)

Moreover, the expansive language of the first sentence of § 706(g), read in conjunction with section 703(j) of the Act, reflects that race-conscious action is contemplated. Section 703(j) provides:

> [n]othing contained in this title shall be interpreted to require any employer...subject to this title to grant preferential treatment to any individual or to any group because of

> the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer .... in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section or other area, or in the available work force in any community, State, section, or other area.

42 U.S.C. § 2000e-2 (1978).

Section 703(j) concerns liability under the Act. It provides that an employer will not be liable under Title VII merely because a racial imbalance, without more, exists among his or her employees.

Petitioners nevertheless erroneously contend that § 703(j) is a limitation upon the remedies which a court may award pursuant to § 706(g). The legislative

history of the section belies that interpretation.[4]

The original version of Title VII passed by the House of Representatives contained no provision like § 703(j). Opponents of the bill argued that, in the absence of a definition of the word "discrimination", federal agencies and courts would equate "discrimination" with "racial imbalance". For example, opponents on the Judiciary Committee produced a Minority Report which noted that the word "discrimination" was nowhere defined and charged that the absence of any reference to "racial imbalance" was a "public relations" ruse and that "the administration intends to rely upon its own construc-

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[4] Amicus Curiae United States, filing on behalf of Petitioners, readily concedes, that 703(j) applies only to liability and not to remedies. Brief of the United States in connection with the Local 93 case at p.13.

tion of 'discrimination' as including the lack of racial balance..." HR Rep. No. 914, 88th Cong. 1st Sess., pt. 1, pp. 67-68 (1963). Those opponents feared that Title VII would be used to force employers to maintain in every job a specific proportion of minorities or women, even in the absence of any past discriminatory practices.

Supporters of Title VII responded that race-conscious action could not be required in the absence of past discrimination. The following colloquy took place between Senators Robertson and Humphrey:

> Senator Robertson: It is contemplated by this title that the percentage of colored and white population in a community shall be in similar percentages in every business establishment that employs over 25 persons...
>
> Sentator Humphrey: The bill does not require that at all... There is no percentage quota.

110 Cong. Rec. 5092 (1964).

Senator Humphrey's remark should not be taken out of context, however. It does not prove, as Petitioners and the United States assert, that race-conscious action was opposed in all circumstances. Rather, it is part of a debate concerning preferential treatment as a remedy for racial imbalance alone.

The dispute was finally resolved by the introduction of a substitute bill, the "Dirksen-Mansfield" amendment, on May 26, 1964. This bill contained § 703(j) which "apparently calmed the fears of most of the opponents; after its introduction, complaints concerning racial balance and preferential treatment died down considerably." United Steelworkers v. Weber, 443 U.S. 193, 247 (1979) (Rehnquist, J. dissenting).

Section 703(j) thus does not prohibit remedial race-conscious affirmative relief:

its focus is on liability rather than permissible remedies. Courts are not, however, precluded from considering racial imbalance as evidence of a Title VII violation,[5] and once a finding is made that certain unlawful employment practices have caused a numerical racial imbalance, a court may order relief pursuant to § 706(g). Thus, to paraphrase § 703(j), while an employer may not be required to grant preferential treatment to any group on the basis of race simply because there is a racial imbalance between workplace and community, if discrimination is established, the broad equitable remedies provided by § 706(g) may be ordered, including the preferential treatment for particular groups to which § 703(j) refers.

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5 See Teamsters v. United States, 431 U.S. 324, 339-40, n.20 (1977).

Indeed, as this Court pointed out in United Steelworkers v. Weber, 443 U.S. 193, 206 (1979), had Congress meant to prohibit all race-conscious affirmative action, it could easily have changed the wording (and thus the focus) of § 703(j) to "nothing in Title VII shall be interpreted to permit" race-conscious action. In a similar vein, Congress could also have expressly limited § 706(g), instead of furnishing the courts with such broad equitable authority. By the broad wording of § 706(g), courts are empowered to order and approve "appropriate" affirmative action, which "may include, but is not limited to ... hiring of employees ... or any other equitable relief as the court deems appropriate,"[6] as well as make-whole relief

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6 By 1972 at least four circuits had ruled that Title VII remedies were not restricted to make-whole relief for individual victims of discrimination, and

---

that a rejection of affirmative action remedies involving goals and timetables "would allow complete nullification of the stated purposes" of the Civil Rights Act of 1964. United States v. IBEW, Local 384, 428 F.2d 144, 149-51 (6th Cir.), cert. denied 400 U.S. 943 (1970). See also, United States v. Ironworkers, Local 86, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971); United States v. Sheet Metal Workers, Local 36, 416 F.2d 123 (8th Cir. 1969); Local 53, Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

The words "or any other equitable relief" were added to § 706(g) in 1972 with the intention that: " [t]he provisions of this subsection are intended to give the court wide discretion, as has been generally exercised by the courts under existing law, in fashioning the most complete relief possible." (emphasis added). Subcommittee on Labor, 92 Cong., 2d Sess., Legislative History of the Equal Employment Opportunity Act of 1972, 1773-74, 1838-39 (Comm. Print 1972). Congress knew that the courts sanctioned race-conscious class-based prospective relief.

The full text of two cases in which such remedies were approved was placed in the Congressional Record by Senator Javits: United States v. Ironworkers Local No. 86, 428 F. 2d at 144; Contractors Association of Eastern Pennsylvania v. Secretary of Labor 442 F.2d 159 (3rd Cir.), cert. denied, 404 U.S. 854 (1971); 118 Cong. Rec. 1765 (1971).

Moreover, Congress explicitly con-

for individual victims of discrimination such as reinstatement and back pay. The former relief must include race-conscious relief if the goals of the Civil Rights Act - among them "the integration of blacks into the mainstream of American society," Weber, 443 U.S. at 202 - are to be achieved.

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sidered and rejected proposals to alter the prevailing judicial interpretations of Title VII as permitting, and in some circumstances, requiring race-conscious relief.

> In any area where the new law does not address itself, or in any areas where specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.

Legislative History of the Equal Employment Opportunity Act of 1972, p. 1844. (Comm.-Print 1972). See generally Comment, The Philadelphia Plan: A Study in the Dynamics of Executive Power, 39 Cin. L. Rev. 723, 747-57 (1972).

B. Prior Precedent Of This Court Establishes That Race-Conscious Relief Is Permitted Under Title VII.

In both University of California Regents v. Bakke, 438 U.S. 265 (1978), and United Steelworkers v. Weber, 443 U.S. 193 (1979), a majority of this Court agreed that, to remedy the effects of past discrimination, relief that favored groups previously discriminated against may be appropriate under the Civil Rights Act in general, and Title VII in particular.[7]

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[7] Petitioners' reliance on Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978), Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983), and Connecticut v. Teal, 457 U.S. 440 (1982) for the principle that Title VII does not permit prospective race-conscious relief is misplaced.

In Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978), this Court held that an employer may not discriminate in providing pension benefits to male and female employees on the basis of generalizations about the average woman and the average man. The Court stated that Title VII prohibits employment decisions premised on stereotyped assumptions. 435 U.S. at

707-11. In stating that "[t]he statute's focus on the individual is unambiguous" and that Title VII "precludes treatment of individuals as simply components of a racial, religious, sexual, or national class," this Court in Manhart addressed whether Title VII permits an employer to limit opportunities for employment or employment benefits on the basis of stereotypes about the characteristics of a class. 435 U.S. at 708.

The emphasis in Manhart on protecting the individual from descriptive generalizations about the individual's class is not relevant to a consideration of race-conscious relief, which does not entail any stereotypes of an empirical nature about the qualifications or other factual characteristics of whites or blacks. The only factual assumption underlying prospective race-conscious relief is the finding that the employer has discriminated. Both qualified whites and qualified nonwhites are eligible for employment, promotion, and related benefits under the affirmative action plans challenged in both of the present cases. Race is not used as a proxy for any other characteristic, whereas Manhart concerned the use of sex as a proxy for longevity.

Petitioners also erroneously rely upon Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983). Justice Marshall's opinion in that case drew heavily on the Court's reasoning in Manhart. In Norris, the issue was the permissibility under Title VII of conditioning employee benefits on factual generalizations about the

In Bakke, the Court analyzed the "special admissions program" of the University of California at Davis Medical School which provided that 16 places at the school were to be reserved for qualified black students. Whether this limitation was "described as a quota or a goal", it was "undeniably a classification based on race and ethnic background". 438 U.S. at 289. While four members of the

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characteristics of the class to which an individual belongs. 463 U.S. at 1079-86. Norris, like Manhart, does not control the cases now before the Court.

Connecticut v. Teal, 457 U.S. 440 (1982), is similarly inapposite. That case concerned whether an individual victim of race discrimination was protected by Title VII despite the presence of large numbers of members of that person's race in the work force. This Court answered that question in the affirmative, rejecting the so-called "bottom line" defense. The Court's opinion, written by Justice Brennan, must be read in the context of the question then before the court, and does not apply to a race-conscious plan devised as a remedy for proven prior discrimination.

Court[8] held that "whether race can ever be used as a factor in an admissions decision is not at issue in this case", Id. at 411, the other five, Justices Powell, White, Brennan, Marshall and Blackmun (the "majority") held that race could be taken into account in certain circumstances. As the latter four justices stressed in their opinion, the "central meaning" of the Court's different opinions was that:

> [g]overnment may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least where appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.

Id. at 325. Their opinion, which stressed that Title VI permitted race-conscious action to the extent that it was permitted

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[8] Stevens, Stewart, Rehnquist, J.J., Burger, C.J.

by the Constitution, accepted that "racially neutral remedies for past discrimination were inadequate where consequences of past discriminatory acts influence or control present decisions." Id. at 362. Justice Blackmun restated this principle forcefully in his own separate opinion:

> I suspect that it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently.

Id. at 407.

While the Court's primary focus was on Title VI and the Constitution, references to Title VII in the opinions reflect that the Court recognized that racial preferences were permissible remedies under Title VII. Justice Powell, noting that

"[t]he state certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination", id. at 307, observed that "Title VII principles support the proposition that findings of identified discrimination must precede the fashioning of remedial measures embodying racial classifications." Id. at 308, n. 44. (Emphasis added). Justices White, Brennan, Marshall and Blackmun wrote that:

> [t]his Court has construed Title VII as requiring the use of racial preferences for the purpose of hiring and advancing those who have been adversely affected by past discriminatory employment practices, even at the expense of other employees innocent of discrimination.

Id. at 340-41, n.17. (Emphasis added).

In United Steelworkers v. Weber, the

majority[9] held that Title VII should not be interpreted to condemn a private, voluntary, race-conscious affirmative action plan which reserved for black employees 50% of the openings in a craft-training program until the percentage of black craftworkers in the plant equaled their representation in the local labor force. While the Court stated that the decision did not pertain to what a court might order to remedy a violation of the Act, it did state that:

> an interpretation of [§§ 703(a) and (d)] that forbade all race conscious affirmative action would "bring about an end completely at variance with the purpose of the statute and must be rejected."

443 U.S. at 202 [citation omitted].

The Court stated further:

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[9] The majority included Justices Brennan, Stewart, White, Marshall and Blackmun. Justices Powell and Stevens took no part in the consideration or decision.

> It would be ironic indeed if a law triggered by a nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long"... constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

Id. at 204 (citation omitted).

Petitioners' and the United States' argument that a race-conscious remedy is not permissible as part of a consent decree or court order under Title VII where there has been a finding of discrimination is logically inconsistent with the Weber ruling. Not only does the argument ignore the plain words of Weber but also it posits a situation in which actual violators of Title VII would be expressly forbidden from fully rectifying the effects of their discriminatory actions, while well-meaning employers who may have committed no Title

VII violation would be encouraged and allowed to engage in race-conscious employment practices. Neither this Court, nor Congress, could have intended such an inconsistent result.

Petitioners erroneously rely on this Court's ruling in Firefighters Local Union No. 1784 v. Stotts, 104 S.Ct. 2576 (1984) to support their position.[10] At issue in Stotts was the legality of an injunction issued by the district court, and upheld by the Court of Appeals, which prevented the firing of employees by the Memphis Fire Department on a "last hired, first fired" basis. The district court found that the proposed layoffs would have a racially discriminatory effect and would undermine the progress made in integrating

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10 See Brief of Petitioner Local 28 at p. 17, Brief of Petitioner Local Number 93 at p. 19; see also Brief for the United States as Amicus Curiae at p.13.

the fire department by a consent decree which provided for race-conscious hiring policies. In striking down the injunction, this Court purposely confined its decision to the question of make-whole relief for actual discriminatees, and thus to an analysis of the final sentence of § 706(g) which refers only to relief for individuals rather than classes.[11] The majority concluded that the final sentence of § 706(g) authorizes a Court "to provide make whole relief only to those who have been actual victims of illegal discrimination. . ." Stotts, 104 S.Ct. at 2589. (Emphasis added) In the cases sub judice, which do not involve make-whole relief, the statute's limitation of such relief "only to... actual victims of discrimination" is irrelevant.

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11 See supra, p. 8.

Furthermore, the disagreement between the majority and the dissent in Stotts regarding the proper characterization of the relief awarded by the district court as prospective or make-whole relief underscores the narrow scope of the prohibition contained in § 706(g). The majority viewed the injunction against minority layoffs as individual awards of retroactive seniority and hence make-whole relief to specific members of the class, governed by the final sentence of section 706(g). The dissent viewed the injunction as prospective race-conscious relief, since the city remained free to lay off any individual black as long as a certain overall percentage remained on the force. Id. at 2606.

Moreover had the majority really intended to condemn class-based, race-conscious relief, it would surely have questioned the validity of the underlying

consent decree which included hiring and promotion goals to redress past discrimination in the Fire Department However, the legality of the decree, which was analyzed extensively and upheld by the Sixth Circuit was not commented on by this Court. See Stotts, 679 F.2d 541 (6th Cir. 1982).[12]

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12 Stotts must also be distinguished from the instant cases by its narrow focus on the issue of abrogation of seniority rights. Neither of these cases involves any abrogation of seniority rights. See Vanguards of Cleveland v. City of Cleveland, et al. 735 F. 2d 479, 486 (1985); E.E.O.C. v Local 638...Local 28 of Sheetmetal Workers, 735 F. 2d 1172, 1186 (1985). In Stotts, the Court analyzed the relationship of section 703(h) and section 706(g). It concluded that section 703(h) protects bona fide seniority systems which are not adopted with discriminatory intent, even when they have a discriminatory impact on a minority group. Section 703(h) like section 703(j), thus speaks only to substantive liability. The Court went on to say, however, that this protection was not total; on the facts in Stotts non-minority employees with seniority could be displaced by minority employees, where grants of retroactive seniority would be appropriate to make whole individuals who

Petitioners' reliance on Teamsters v. United States, 431 U.S. 324 (1977) is similarly misplaced. Teamsters, like Stotts, involved the interrelation of seniority and make whole relief for individual victims of discrimination. Minority drivers, discriminated against prior to the effective date of Title VII by being excluded from the "line driver" position, found that on transfer to those positions the company's seniority plan limited competitive seniority to the length of time an employee had been a line driver at a particular terminal.

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could prove that there was a discriminatory reason for them personally being the last hired. 104 S. Ct. at, ___, n. 9, ___, 81 L.Ed. 2d 483, 497; O'Connor, J. concurring at ___, 81 L. Ed 2d 483, 505. The Court's discussion of section 706(g) thus concentrated on proof of individual discrimination in the context of a bona fide seniority system.

However, while forbidding retroactive seniority to anyone other than actual discriminatees, the Court noted without disapproval that the company had entered into a consent decree providing that, once the injury to the individual victims of discrimination had been remedied, it would fill future vacancies at its terminals by hiring one Negro or Spanish-surnamed person for every white person until the percentage of minority group workers at the terminal equaled the percentage of minority group members in the population of the metropolitan area surrounding the terminal. 431 U.S. at 330, n. 4. The Court went on to note that "[t]he federal courts have freely exercised their broad equitable discretion to devise prospective relief designed to assure that employers . . . eliminate their discriminatory practices and the effects there-

from . . . . In this case prospective relief was incorporated in the parties' consent decree." Id. at 361, n.47. (emphasis added)[13] The foregoing demonstrates that Title VII both permits and contemplates race-conscious class-based relief.

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13 For over twenty years, the lower federal courts have also interpreted Title VII as providing the courts with broad equitable authority to design race-conscious action to eliminate the vestiges of past discrimination. See, e.g., Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017, 1027-1028 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975); Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622, 629 (2d Cir. 1974); E.E.O.C. v. American Tel. & Tel. Co., 556 F.2d 167, 174-77 (3rd Cir. 1984), cert. denied, 438 U.S. 915 (1977); Chisholm v. United States Postal Service, 665 F.2d 482, 499 (4th Cir. 1981); United States v. City of Alexandria, 614 F.2d 1358, 1362-66 (5th Cir. 1980); United States v. City of Chicago, 663 F.2d 1354, 1356 (7th Cir. 1981) (en banc); Firefighters Institute v. City of St. Louis, 616 F.2d 350, 364 (8th Cir. 1980), cert. denied, 452 U.S. 938 (1981); United States v. Lee Way Motor Freight, Inc., 625 F.2d 918, 944 (10th Cir. 1979; Thompson v. Sawyer, 678 F.2d 257, 294 (D.C. 1982).

II. CLASS-BASED RACE CONSCIOUS RELIEF IS CONSTITUTIONAL UNDER THE FOURTEENTH AMENDMENT

Petitioner Sheet Metal Workers Union urges that the class based, race-conscious relief ordered herein to remedy the years of intentional discrimination practiced by the Union violates the equal protection clause of the Fourteenth Amendment. The Union urges, inter alia, that because the remedial plan at issue benefits more than individual identifiable victims of discrimination, it is unconstitutional. (Pet.-brief, p. 30) The Union's view, however, ignores the teachings of this Court and is nothing more than a thinly veiled attempt by the Union to perpetuate the intentional discrimination in which it has continued to engage. As Justice Blackmun stated in University of California Regents v. Bakke, 438 U.S. 265 (1978) [Bakke], "We cannot -- we dare not -- let the Equal Protection

Clause perpetrate racial supremacy." 438 U.S. at 407. An analysis of this Court's opinions in this area reveals not only that race-conscious remedies are constitutional but also that this Court considers them crucial for the purpose of ending discrimination.

In Bakke, as in Fullilove v. Klutznick, 448 U.S. 448 (1980) [Fullilove], this Court examined race-conscious affirmative action plans for their adherence to Fifth and Fourteenth Amendment principles. In Bakke, the University of California's "special admissions program" was scrutinized, while the "Minority Business Enterprise" ("MBE") provision of the Public Works Employment Act (§ 103(f)(2)) was examined in Fullilove. In both cases the programs were introduced in order to remedy what was perceived as significant underrepresentation of minorities in particular

fields of endeavor. Neither plan required that an individual, to qualify for the benefits of the program, demonstrate that he or she had been individually discriminated against by the medical school or the public works project to which application was made.

While this Court was unable to agree on a majority opinion in either case, it did recognize that under certain circumstances remedial race-conscious relief is justified. In separate opinions, the Justices articulated individual standards of scrutiny for determining when race-conscious remedies may be deemed appropriate.[14]

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[14] Justices Stevens, Burger, Stewart and Rehnquist did not reach the constitutional issue in Bakke and decided the case instead by reference to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. They did, however, offer some guidance in Fullilove. See discussion infra.

Justice Powell, in his opinions,[15] advocated strict scrutiny toward race-conscious plans. He cautioned that a race-conscious remedy would not be considered "compelling" unless the "appropriate" governmental authority determined that a constitutional or statutory violation had occurred, there existed some illegal discrimination in the past which justified a remedy at present, and the method selected to achieve the legitimate goal of addressing and eradicating identifiable past discrimination be "narrowly drawn" to fulfill the governmental purpose, although the method need not be "limited to the least restrictive means of implementation." Fullilove, 448 U.S. at 498.

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[15] Justice Powell wrote for the Court in Bakke by virtue of his swing vote and offered his own separate opinion applying his Bakke method of analysis in Fullilove.

While Justice Powell had reservations about race-conscious remedies, he clearly appreciated their necessity: "The time cannot come too soon when no governmental decision will be based upon immutable characteristics of pigmentation or origin.-

But in our quest to achieve a society free from racial classification, we cannot ignore the claims of those who still suffer from the effects of identifiable discrimination." Id. at 516.

In their joint separate opinions, Justices Brennan, Marshall and Blackmun[16] interpreted the equal protection clause to permit an even wider range of race-conscious relief for the benefit of historic victims of discrimination. They

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[16] Justice White also joined with these justices in their Bakke opinion, but joined with Chief Justice Burger in Fullilove.

employed an "intermediate"[17] rather than "strict" standard of scrutiny to review such action, and readily accepted the proposition that the Constitution need not be color blind. Bakke, 438 U.S. at 336.[18] The Justices held that an articulated purpose of remedying the effects of past discrimination was a sufficiently important interest to justify the use of racial classifications. Id. at 520; Bakke, 438 U.S. at 362.[19]

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[17] This intermediate standard of scrutiny had been used in sex discrimination cases. See e.g. Mississippi University for Women v. Hogan, 458 U.S. 718 (1982).

[18] The Justices noted in Fullilove that their analysis in the Fifth Amendment area was the same as that under the Fourteenth Amendment. 448 U.S. at 517, n.2, quoting Bakke, 438 U.S. at 367, n.43.

[19] The Justices further recognized that the very principles which outlawed the "irrelevant or pernicious use of race were inapposite to racial classifications that provide benefits to minorities for the purpose remedying the present effects of

The legitimacy of race-conscious relief was also acknowledged by Chief Justice Burger and Justice White in their joint opinion in Fullilove.[20] The Justices recognized the need for "careful judicial evaluation" to assure that any program employing racial or ethnic criteria to remedy the present effects of past discrimination is "narrowly tailored to the achievement of that goal." 448 U.S. at 480.[21]

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past discrimination." 448 U.S. at 518.

[20] Justice Powell joined in this opinion in addition to his own separate opinion.

[21] The Justices' analysis proceeded primarily in three steps. At the outset, they determined that the goals of the plan be legitimate. They determined further that the objectives must be within the powers of Congress as the governmental body which drafted the legislation. Their final inquiry concerned whether a limited use of racial and ethnic criteria could be a constitutionally permissible means for achieving legislative objectives in light of the equal protection component of the

In accordance with the views of their colleagues, Justices Burger and White generally accepted the concept that in a "remedial context", a governmental body need not be oblivious to race in fashioning a remedy. Id. at 482. The failure of non-minority firms to receive certain contracts was viewed as an incidental consequence of the program: "such a sharing of the burden" was not considered impermissible. Id. at 484, quoting Franks v. Bowman Transportation, 424 U.S. 747, 777 (1976).

The majority of the members of this Court thus have regarded race-conscious remedial plans as constitutional provided that they meet certain standards. The

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due process clasue of the Fifth Amendment (in the case of Federal legislation). 448 U.S. at 473. The Justices were particularly concerned that the means employed be "narrowly tailored" to achieve those objectives. Id. at 487, 490.

Court, in its various voices, has required: 1) that the body taking the action be competent to articulate and respond to the purpose served by the action; 2) that the governmental interest or objective at stake be important or compelling; 3) that the means adopted be substantially or closely tailored to serve the governmental purpose so as not to trammel unnecessarily the interests of innocent third parties; and 4) that the action stigmatize no one.[22]

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22 In neither Bakke nor Fullilove were there findings that the specific medical school or a specific public works project had discriminated against minorities. Nonetheless, a majority of this Court sanctioned race-conscious relief as enumerated supra. In Local 28 the facts as found by the district Court are far more egregious. As detailed in respondent's brief, and the brief of Amicus NAACP LDF, Local 28 itself engaged in intentional and systematic discrimination of the most repugnant sort. Thus, the justification for strong remedies in the instant case is particularly compelling.

Petitioner Sheet Metal Workers Union fails to analyze in any detail this Court's decisions which consider the constitutionality of race-conscious plans. Instead, petitioner merely states in a conclusory fashion that "this Court has not approved racial classifications unless (1) Congressional findings have been made that members of one group have suffered discrimination; (2) the legislation is tailored to benefit only the individual victims; and (3) although the statute may confer benefits unavailable to others, it does not trammel their fundamental rights. [Citation omitted: emphasis added.]" (Petitioner's Brief, p. 30).

Petitioner's conclusion that a race-conscious remedy must, inter alia, be tailored to benefit only individual victims is baffling, since the cases which analyze the constitutionality of affirmative relief

specifically say otherwise. Indeed, many of the Justices give strong endorsements to class-based, race-conscious relief which is not at all "victim specific."

The Public Works statute at issue in Fullilove which required that 10% of public works funds be set aside for minority business enterprises, did not require that only minority businesses which had been actual victims of discrimination could qualify for the set-aside. On the contrary, the only statutory limitation imposed on the set-aside was that it be granted to "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aliens." § 103(f)(2) of the Public Works Employment Act of 1977. Similarly, the regulations promulgated thereunder did not limit in any way the beneficiaries of the race-conscious plan to actual identifiable victims of

discrimination. The operative fact was membership in one of the protected groups.

Justices Burger, White and Powell, in upholding the constitutionality of the remedial plan in Fullilove, fully recognized that the plan did not contemplate conferring benefits only on identifiable victims of discrimination. They acknowledged that a business enterprise sufficiently composed of members of one of the enumerated ethnic groups qualified that business for remedial benefits. 448 U.S. at 458-59. Nowhere in their opinion did they suggest that the enterprise must have been the victim of discrimination to qualify for relief.

Nor did the Justices limit the relief available to make-whole relief. They specifically found that the set-aside in Fullilove which they approved was prospective in nature, stating that "[o]ur

review of the regulations and guidelines governing administration of the MBE provision reveals that Congress enacted the program as a strictly remedial measure; moreover, it is a remedy that functions prospectively, in the manner of an injunctive decree." 448 U.S. at 481.

Similarly, this Court in Bakke condoned race-conscious class-based relief, and specifically declined to limit such relief to identifiable victims. The majority of this Court in Bakke, inter alia, reversed the California Supreme Court's judgment which precluded the future consideration by the defendant of the race of applicants, holding instead that such consideration could be appropriate. This Court approved giving special consideration to all applicants who were members of a class that had suffered discrimination, regardless of whether or not the indi-

vidual was a specific victim of discrimination.

Justices Brennan, White, Marshall and Blackmun, in their joint opinion, made the race-conscious class-based nature of the relief clear:

> Congress can and has outlawed actions which have a disproportionately adverse and unjustified impact upon members of racial minorities and has required or authorized race-conscious action to put individuals disadvantaged by such impact in the position they otherwise might have enjoyed. [citations omitted]. Such relief does not require as a predicate proof that recipients of preferential advancement have been individually discriminated against; it is enough that each recipient is within a general class of persons likely to have been the victims of discrimination. (emphasis added).

Bakke, 438 U.S. at 363.

In light of the fact that this Court has approved race-conscious remedies, Petitioner's position that remedial plans

which consider race are unconstitutional is untenable. Furthermore, Petioner's argument defies logic. An actual identified victim of discrimination who is granted a remedy is not granted a so-called race-conscious remedy. Rather, that individual is granted relief to remedy a wrong that has been inflicted specifically on him or her. The victim's race is not at issue in determining whether or not some remedy is appropriate. As has already been demonstrated, however, this Court has approved race-conscious remedies. Thus, this Court must necessarily have been sanctioning relief broader in scope than that which has traditionally been available to individual victims.

The school desegregation cases decided by this Court substantiate that class-based race-conscious relief is constitutional. In Green v. County School Board, 391

U.S. 430 (1968), a unanimous Court, rejecting as ineffectual a racially neutral "freedom-of-choice" school desegregation plan, ordered the school board to take immediate action to desegregate its two schools, a task impossible without attention to race. Three years later, in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), this Court again unanimously affirmed the power of the lower courts to order race conscious teacher and student assignments to integrate the schools in districts that had defaulted in their duty to build unitary systems. Swann further recognized that school authorities exercise broader powers than courts in devising desegregation plans and that they might legitimately decide "that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to White

students reflecting the proportion for the district as a whole." 402 U.S. at 16. This Court went on to hold in McDaniel v. Barresi, 402 U.S. 39 (1971), that school authorities could voluntarily desegregate their schools by drawing attendance zones so as to improve racial balance.

Taken together, these school desegregation cases stand for the proposition that courts, school boards and other arms of the government may, and in some circumstances must, make reference to race in remedying equal protection violations recognized by this Court. They further reflect that race-conscious remedies may not only be class-based but also prospective in nature.

Moreover, the remedial plans sanctioned in the school desegregation cases did not in any way limit the plans' benefits to students who were the indi-

vidual victims of discrimination, or who had previously attended segregated schools. Future as well as current entrants into the school system were beneficiaries of the plans. In every respect these plans conferred benefits upon classes of people, rather than upon individual victims of discrimination.

This Court's prior decisions make it irrefutable that race conscious relief afforded to classes of people, rather than only to individual victims, is constitutional. Thus, the argument of Petitioner Sheet Metal Workers Union must be rejected, and the opinion of the Second Circuit upheld.

III. THE HISTORIC AND CONTINUING LIMITATION OF WOMEN'S EMPLOYMENT OPPORTUNITIES REQUIRES AND JUSTIFIES RESORT TO CLASS-BASED REMEDIES

At issue in the instant cases is the validity of class-based race-conscious

remedies. The discrimination which minorities have historically suffered necessitates and justifies resort to such remedies. Women, particularly women of color, have likewise been denied equal rights and equal employment opportunities. Sex-based remedies have helped to rectify the problems faced by women, but far greater strides must be made. Unless this Court continues to sanction the use of class-based remedies, women, like minorities, will be denied equal employment opportunity. Bearing in mind the broad impact that this Court's decisions in the instant cases will have on women, a review of their economic and employment status will help put the issues presented in broader perspective.

A. Women of All Races Have Sufferred Historic Discrimination in Employment and are Overrepresented in Low Paying Clerical and Semi-professional Jobs.

Discrimination against women in the workplace is not a new phenomenon. It is the product of a society that traditionally limited women to the role of homemaker and a legal system that maintained this exclusion by treating women as little more than appendages to their husbands.

Since the passage of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., women's present employment opportunities are no longer legally restricted. But the underlying attitude that women do not "belong" in the workplace remains prevalent. Despite dramatic increases in their workforce participation, U.S. Department of Labor, Women's Bureau 20 Facts on Women Workers (1984) [hereinafter cited as 20 Facts] women have been far less successful in gaining entry to male-dominated professions. Thus clerical work

remains the largest occupation for women. U.S. Department of Labor, Women's Bureau, The United Nations Decade for Women, 1976-1985: Employment in the United States (July 1985) [hereinafter cited as Decade for Women]. While women have begun to make inroads into formerly male occupations,[23] they still represent only a tiny fraction of employees in traditionally "male jobs," which are usually better paid then traditionally female jobs.

Job segregation pervades all sectors

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23 By 1981 there were more than 802,000 women employed in the skilled trades, more than double the number in 1970 and almost four times the number in 1960. 20 Facts. Women have also made gains in other predominantly male professions, such as law, medicine and engineering. The category of bank officers and financial managers is the fastest growing managerial occupation for women. U.S. Department of Labor, Women's Bureau, Time of Change: 1983 Handbook on Women Workers (1983) [hereinafter cited as Time of Change].

of our economy, as is reflected by the following chart:

Jobs	% Female
Nurse	95.8
Kindergarten & Prekindergarten Teacher	98.2
Dental Hygienist	98.6
Secretaries	99.0
Child Care Workers	96.8
Cleaners & Servants	95.8
Receptionists	96.8
Construction Workers	7.0
Mechanical Engineers	2.8
Airplane Pilots & Navigators	2.1
Firefighters	1.0
Tool & Die Makers	1.2
Electricians	1.5
Brickmasons & Stone Masons	.3

Handbook of Labor Statistics, U.S. Dep. of Labor, Bureau of Labor Statistics (June 1985) [herinafter cited as Handbook 1985]

The occupations involved in the instant cases well illustrate the problem. The sheetmetal workers profession ranks among the most sex-segregated industries. In 1972 only 0.7% of the sheetmetal workers and tinsmiths in the United States were women. Time of Change, p. 59. By 1981

that figure had risen only to 3.2%. Time of Change, p. 59. In 1983, women comprised a scant 4.5% of the sheetmetal workers labor force. Handbook 1985, p. 52.

In 1972 only 0.5% of the firefighters in the United States were women. Nine years later, in 1981, women had only made marginal gains, representing only 0.9% of the firefighter force. In 1983 the figure had risen to a mere 1.0%. Handbook 1985

Women will not achieve economic equality until job segregation is eliminated and women have equal access to all employment opportunities. Only with sex and race-conscious remedies will those goals be achieved.

For women of color, who suffer double discrimination based on sex and race or national origin, the problems of job segregation and low pay are especially pronounced. While historically women of

color, particularly black women, were a part of the paid labor force years before white women entered in any numbers, they have not reaped the benefits of their greater labor force participation.

As early as 1890, two out of five black women over the age of 10 were in nonfarm occupations. By 1950 black female participation in the labor market had increased to 46% and this figure rose to 49.5% in 1967 and to 53% in 1978. Julianne Malveaux, Low Wage Black Women: Occupational Descriptions, Strategies for Change, p. 4, January 1984.[24] By 1983 more than 70% of black women between the ages of 25 and 44 were workers. Low Wage Black Women, p. 5.

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24 Unpublished paper prepared for the NAACP Legal Defense and Education Fund, Inc. [hereinafter cited as Low Wage Black Women].

Notwithstanding their high labor force participation, black women also suffer, from occupational segregation and wage discrimination. Although black women are leaving the private household domestic service in which they have predominated in the past,[25] nearly 60% of all black women are employed in clerical and service occupations. Low Wage Black Women, p. 8. Even in traditionally female occupations, black women hold the lowest paying positions: welfare services aides, child care workers, and food counter workers. Low Wage Black Women, pp. 12-13.

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25 In 1980, 52% of black women worked in domestic and personal service occupations. By 1930, nearly two-thirds of black women workers performed domestic and personal service jobs. By 1940, 70% of all black women worked in domestic and personal service jobs, with about 60% working in private homes. By 1960 the proportion of black women in domestic jobs declined to 57%. Between 1960 and 1981, the proportion of black women domestic workers decliend further. Low Wage Black Women.

Black women have begun to improve their employment status to some degree. Between 1970 and 1982, they increased their proportions in a number of professional and technical jobs, as accountants, nurses, dieticians and engineering and science technicians. Decade for Women. Black women have, however, made few inroads into traditionally male professional occupations: fewer than 2% of all attorneys are black women, and they are fewer than 3% of all physicians, scientists, computer specialists or architects. Low Wage Black Women. p. 13. Black women's earnings reflect their status in the workplace: they earn about 59 cents for every dollar earned by a man. U.S. Department of Labor Statistics, Employment and Earnings. January, 1985 [hereinafter cited as Employment and Earnings, January, 1985].

The profile of Hispanic women workers is similarly bleak. Hispanic women are also predominantly clustered in low-paid, semiskilled occupations. Although the large percentage of Hispanic women employed as clericals is similar to the situation among all women, they are employed to a greater extent than are other women in operative jobs -- as dressmakers, assemblers and machine operators. Time of Change. Hispanic women earn approximately 55 cents for every dollar earned by a man. Employment and Earnings, January, 1985.[26]

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26 About 2 million Asians, Pacific Islanders and Native Americans make up the remainder of female workers of color. The leading occupations of Native American women include secretaries, food service workers, teachers, and cleaning and building service workers. Occupations for Asian and Pacific Islander women include work as technicians, secretaries, financial sales, machine operators and teachers. Decade for Women.

Women's employment status translates directly into poverty. Women represented 61% of all persons aged 16 and over who had incomes below the poverty level in 1983. The proportion of poor families maintained by women was 47% in 1983, up from 43 percent. Nearly 72% of black families with incomes below the poverty level were headed by women. Forty six percent of Hispanic families, and 37% of white families were in similar situations. 20 Facts. The over-representation of women -- especially women of color -- among the poor in the country is another indication that the tiny gains that women have achieved in the workplace are simply not enough.

B. Affirmative Action Has Proven To Be An Effective Tool In Ensuring That Women Achieve Equal Employment Opportunity.

Race-conscious relief, rather than a "color-blind" remedial approach to discrimination, is needed to help women achieve equal employment opportunity. Affirmative action, sparked by meaningful enforcement of the anti-discrimination laws, works. The progress achieved by women and minorities males in the workplace has been due in large part to vigorous enforcement of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq., and to enforcement of Executive Order 11246, as amended. Recent studies confirm these observations.

In a 1983 study of the Federal enforcement of Executive Order 11246, as amended, comparing the status of women and minorities in contractor and noncontractor establishments, the author concluded that the contract compliance program has had a positive impact on female and minority employment between 1974 and 1980. Jonathan

Leonard, The Impact of Affirmative Action, University of California, Berkeley, 1983, p. 362. The study also points to litigation under Title VII as a positive factor in improving the employment status of minority males and women.[27]

In late 1984, a study published by the Potomac Institute found that between 1970 and 1980, as a result of affirmative action, women and blacks experienced significant gains in the job market, with most of the increase concentrated in higher paying jobs. Herbert Hammerman, A Decade of New Opportunity...Affirmative Action in

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27 In 1984 the OFCCP released a study entitled Employment Patterns of Minorities and Women in Federal Contractor and Noncontractor Establishments, 1974-1980, also comparing the status of women and minorities in contractor and noncontractor establishments. The study concluded that "Executive Order establishments posted significantly greater gains in employment in and advancement of women and minorities than those not covered..." Id. p. 37.

the 1970s, the Potomac Institute, October 1984. These studies demonstrate that race-conscious and sex-conscious affirmative action is an effective and necessary tool to achieve equal employment opportunity for workers who historically have suffered discrimination.

CONCLUSION

Based upon the foregoing Amici respectfully urge this Court to affirm the decisions of the Second and Sixth Circuits.

Respectfully submitted,

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APPENDIX

INTEREST AND DESCRIPTION OF AMICI CURIAE

The NOW Legal Defense and Education Fund ("NOW LDEF") is a non-profit civil rights organization that performs a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was established in 1970 by leaders of the National Organization for Women. A major goal of the NOW LDEF is eliminating barriers that deny women economic opportunities. In furtherance of that goal, NOW LDEF has participated in numerous cases to secure full enforcement of laws prohibiting employment discrimination, including cases before this Court involving challenges to the use of affirmative action remedies to achieve equal employment opportunity.

California Women Lawyers is a state-wide association representing the interests of the approximately fifteen thousand women lawyers in the State of California. It has both individual members and twenty-seven local affiliates throughout the state. CWL is dedicated to education and advocacy regarding legal rights of women and equal treatment for women.

Employment Law Center is a project of the Legal Aid Society of San Francisco. The Center is committed to providing legal services to women and minorities in order to vindicate their right to equal employment opportunity.

Equal Rights Advocates, Inc. is a San Francisco-based public interest legal and educational corporation specializing in sex discrimination. It has a long history of interest, activism, and advocacy in all areas of the law which affect equality

between the sexes. ERA, Inc. has been particularly concerned with gender equality in the work force because economic independence is fundamental to women's ability to gain equality in other aspects of society. ERA, Inc. believes that affirmative action is a necessary and appropriate step if women and minorities are to achieve equal opportunity in the workplace.

The League of Women Voters of the United States (LWVUS, or League) is a national, nonpartisan, non-profit membership organization with a current membership of 110,000 in more than 1250 state and local Leagues in all 50 states, the District of Columbia, Puerto Rico and the Virgin Islands. Since being founded in 1920, the LWVUS's purpose has been to promote political responsibility through informed and active participation of citizens in government.

The LWVUS believes that no person or group should suffer legal, economic or administrative discrimination, and that government and private institutions share responsibility to provide equal opportunity in employment. As part of its commitment to the eradication of employment discrimination against minorities and women, the LWVUS has participated as an amicus in support of the use of affirmative action remedies in a number of major cases.

The National Women's Law Center is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and to the corresponding elimination of sex discrimination from all facets of American life. Since 1972, the Center has worked to secure equal opportunity in the workplace through full enforcement of Title VII of the Civil Rights Act of 1964, as amended, and other civil rights

statutes, and through the implementation of effective remedies for longstanding employment discrimination against women and minorities.

The Northwest Women's Law Center is a non-profit public interest law organization concerned with securing equal rights for women through the law. It has participated in federal and state litigation and public education efforts directed toward ending unlawful discrimination on the basis of sex. The Law Center has analyzed and commented on local affirmative action plans designed to eliminate past effects of discrimination toward women and minorities. It believes affirmative action is an effective tool toward realizing equality.

Wider Opportunities for Women, Inc. (WOW) is an independent, non-profit, tax-exempt organization which, since 1964, has worked to expand employment opportuni-

ties for women. WOW has provided job counseling, development, referral and training for thousands of women and hundreds of employees. WOW also conducts a national program linking over 80 women's employment organizations throughout the country for increased advocacy on women's employment issues. WOW is strongly supportive of affirmative action as a means of moving women out of poverty toward economic self-sufficiency.

Women Employed is a national organization, based in Chicago, with a membership of 3,000 women workers. Over the past ten years the organization has assisted working women with problems of sex discrimination. Women Employed also monitors the enforcement, actions and policies of the EEOC and Office of Federal Contract Compliance Programs with regard to a broad range of sex discrimination issues.

The Women's Law Fund, Inc. is a non-profit corporation with the primary purpose of bringing women into full participation in all activities of American life by serving them their full legal rights under the law. The Fund is particularly concerned with the problem of achieving equal employment opportunity for women, and, through its funding of litigation, Women's Law Fund, Inc. seeks to assist all women who are discriminated against because of their sex through illegal employment practices.

Millions of American working women are presently being denied equal opportunities in the job market. Despite high economic motivation to work, women, like minorities, continue to be adversely affected by discriminatory hiring, promotion and lay-off systems. Significant progress has been made where employers, employees and

their bargaining representatives are able to work together to further the goal of equal employment opportunity for all. It is timely for the Court, in the instant case, to recognize the constitutionality of voluntary affirmative action plans as one means of preserving and continuing the progress towards reaching this extremely important goal.

The National Bar Association, founded in 1925, is a professional membership organization which represents more than 10,000 black attorneys, judges and law students. Its purposes include protecting the civil and political rights of all citizens. The NBA, through its Women Lawyers Divisions, has been actively involved in issues concerning equal employment opportunity. The Greater Washington Area Chapter of the Women Lawyers Division is particularly dedicated

to addressing the needs of women in the Washington, D.C. metropolitan area.

Women's Law Project is a non-profit law firm dedicated to advancing the status of women through litigation and public education. Founded in 1973, the Women's Law Project has conducted major litigation on behalf of women in the areas of reproductive freedom, family law, discrimination in employment, credit and insurance, and the rights of female prisoners.

The Women's Law Project is especially concerned with the problems of employed women, and challenged through litigation and public education layoff policies which disproportionately affect women or minorities. Women's Law Project believes in the validity and necessity for sex- and race-based preferences to remedy handicaps of past discrimination and to preserve those gains made by women and minorities in

recent years. Therefore, the Women's Law Project joins with other amici in support of the decision of the courts below.

The Women's Legal Defense Fund (WLDF) is a non-profit, tax exempt membership organization, founded in 1971 to provide free legal assistance to women who have been discriminated against on the basis of sex. The Fund devotes a major portion of its resources to combatting sex discrimination in employment, through litigation of significant employment discrimination cases, operation of an employment discrimination counselling program, public education, and agency advocacy before the EEOC and other federal agencies that are charged with enforcement of equal opportunity laws. A major priority for WLDF is its project of Women of Color. In its pursuit of equality for both women and minorities, WLDF is committed to the use of affirmative

action to achieve equal employment opportunity.